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RESPONSIBLE GOVERNMENT IN THE DOMINIONS

BY

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JUNIOR ASSISTANT SECRETARY TO THE IMPERIAL CONFERENCE
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CHAPTER V

TREATY RELATIONS

§ 1. Imperial Control in Treaty Matters

The Imperial Crown has an absolute power of concluding treaties, and in so doing it is advised by the Imperial Ministry. There is no case yet known in which any treaty proper has been made without the consent of the Imperial Government, and the normal mode of making treaties is to conclude them through plenipotentiaries granted full powers by the Crown. The term treaty which has been applied, for example, to the Customs Agreement between the South African Customs Union and the Dominion of New Zealand is merely a terminological inexactitude. In a few cases Governors have been empowered to conclude agreements in the nature of treaties. For example, in 1901 an agreement was made between Lord Milner on behalf of the Transvaal and the Governor-General of Mozambique with regard to the recruitment of native labour for service in the Transvaal mines and railway rates,[1] and this agreement was superseded by another agreement concluded by Lord Selborne as Governor of the Transvaal with the ex-Governor-General of Mozambique on April 1, 1909.[2] The High Commissioner for South Africa has always been entrusted by his commission [3] with special powers of communication with the Governments of foreign possessions

[1] *Parl. Pap.*, Cd. 2104, p. 189.

[2] *Parl. Pap.*, Cd. 4587. In 1909 also the Government made an informal arrangement with Portugal as to the deportation of Indians via Lourenço Marques.

[3] c. g. In Lord Selborne's Commission, 1905, clause iii; Lord Gladstone's, 1910. There are also many arrangements between South African Governors and the Free State and the Transvaal, c. g. a railway convention (Cape and Free State), October 16, 1896; telegraph (Cape, Natal, Transvaal, and Free State), August 11, 1884. The High Commissioner signed the treaty with the Transvaal as to Swaziland in 1894. See Cape *Parl. Pap.*, 1898, G. 81.

in Africa. Direct Conventions with regard to postal matters have several times been concluded with the tacit or express approval of His Majesty's Government, but postal matters have always been treated as being of a commercial character. Or again, in 1904 Australia informally arranged to facilitate the travel in the Commonwealth of Japanese merchants, students, and tourists, but there was no treaty, just as Queensland had arranged informally with the Japanese Consul there for the limitation of emigration from Japan to Queensland in 1900.[1]

There is no real doubt that treaties made by the Crown are binding on the Colonies whether or not the Colonial Governments consent to such treaties. It has indeed been suggested that ratification by the Colonial Government is necessary, and a phrase used by Lord Kimberley in 1872 [2] during the correspondence with the Australian Colonies as to the creation of a quasi Customs Union in Australia has been quoted by Todd [3] in favour of this view. Lord Kimberley there said that the power of making treaties rested with the Imperial Government, subject to legislation being passed by the Imperial and Colonial Parliaments where necessary to enable the treaty to be put in force. But this view is certainly wrong, unless it merely means that a Colony may or may not exercise its right of adherence to a treaty by which it is not bound but with regard to which it is only given an option of adherence, and indeed it would obviously be impossible for international relations to be successfully concluded unless there were one power which could represent effectively in external matters the Empire as a whole. On the other hand, it is an essential part of the Constitution of the Empire that so far as is practical no treaty obligations shall be imposed without their concurrence on the self-governing Dominions.

[1] Commonwealth *Parl. Pap.*, 1905, No. 61 ; Queensland *Parl. Pap.*, 1899, A. 5.

[2] *Parl. Pap.*, C. 576, pp. 6–10 ; below, p. 1174.

[3] *Parliamentary Government in the British Colonies*,[2] p. 275. So also Quick and Garran, *Commonwealth Constitution*, p. 770 ; Quick and Groom, *Judicial Power of the Commonwealth*, p. 104.

Quite apart from this obligation, which exists whether legislation is passed or not, is the question whether the mere making of a treaty can alter the rights and obligations of British subjects. It appears clear in theory that the Crown can cede territory, and thus change the allegiance and the legal rights of its subjects ;[1] but if it does not take this step it appears equally clear that the mere making of a treaty is inadequate to create any new legal rights or duties under municipal law. There is no precisely definite case appearing on the matter, but for all practical purposes the action of the Government in connexion with the case of *Baird* v. *Walker*[2] may be regarded as deciding the matter. In that case Sir Baldwin Walker, under the authority of a *modus vivendi* with the French Republic, concluded by Her Majesty's Government, took steps which involved interference with the property of Mr. Baird on the Treaty Shore of Newfoundland. Mr. Baird brought an action in the Newfoundland Court against Sir Baldwin Walker, whose defence was that his act was an act of state into which the Colonial Court had no power of inquiry. The Colonial Court[3] declined to accept this defence as adequate, and the matter then went on appeal to the Privy Council. The Judicial Committee decided that the decision of the Colonial Court was correct. They expressly disclaimed any intention of passing judgement as to whether the treaty was or was not sufficient justification for the action of Sir Baldwin Walker. What they did decide was, that if the treaty was set up as the justification for his action, it was formally to be pleaded in defence, and that it was no answer to Mr. Baird's claim to say that the act complained of, which was prima facie a breach of Mr. Baird's legal rights, was an act of state. It

[1] See Forsyth, *Cases and Opinions on Constitutional Law*, pp. 182–6 ; the Heligoland debate, 1890, *Hansard*, cccxlvii. 764 ; 1 App. Cas. 352.

[2] [1892] A. C. 491. Cf. *Damodhar Gordhan* v. *Deoram Kanji*, 1 App. Cas. 352 ; *Parlement Belge*, 4 P. D. 129 ; 5 P. D. 197. Cases like *in re Californian Fig Syrup Company's Trade Mark*, 40 Ch. D. 620, show that a treaty cannot overrule a statute, but leaves the position as regards the common law unaffected. Cf. *in re Carter Medicine Company's Trade Mark*, W. N. [1892] 106.

[3] 1897 *Newfoundland Decisions*, 490.

may be noted that counsel did not attempt to argue that any treaty could alter the law, only that treaties of peace, or treaties akin to such treaties, could do so.

The decision of the Privy Council left it open for Her Majesty's Government to defend the action of Sir Baldwin Walker on the ground of the treaty. It is significant that they did not do so, but that they took steps to pay compensation to all those whose lobster factories had been interfered with by Sir Baldwin Walker.

The same question of the effect of a treaty in overriding the law of the country has been discussed in other cases, both by the Privy Council and by Colonial Courts; the general tendency is to consider that the making of a treaty is not sufficient to alter the ordinary rights of British subjects. For example, in the case of *Tsewu* v. *Registrar of Deeds*,[1] decided by the Transvaal Supreme Court in 1905, it was held that, whatever was the force of the Conventions between the Transvaal Republic and Her Majesty's Government in 1881 and 1884, they were not sufficient to make it part of the law of the Transvaal that land held by natives should not be registered in their names, but in the name of a Government officer. In 1902 Mr. Deakin intimated clearly that in his opinion an Imperial Treaty could not override the law of Australia, and though there are expressions of opinion to the contrary,[2] it seems certain that this view is correct.

The correct procedure, therefore, is for every Colony which

[1] [1905] T. S. 30; cf. [1904], T. S. 241; *Vincent* v. *Ah Yeng*, 8 W. A. L. R. 145; *Brown* v. *Lizars*, 2 C. L. R. 837, which decides that an extradition treaty is not sufficient authority for extradition without legislation. See also *Wi Parata* v. *Bishop of Wellington*, 3 N. Z. J. R. (N. S.) S. C. 72, where it was held that a Crown grant was conclusive that the Crown had legally acquired land from the natives, despite the terms of the Treaty of Waitangi; *Nireaha Tamaki* v. *Baker*, 12 N. Z. L. R. 483, overruled in [1901] A. C. 561; *Greenberg* v. *Williams, N. O.*, 3 H. C. G. 336; and *Cook* v. *Sprigg*, [1899] A. C. 572; 9 C. T. R. 701.

[2] The British Columbia Courts held the reverse, and this is also the view of the Provincial Government; see *Tai Sing* v. *Maguire*, 1 B. C. (Irving), at p. 109, and Lefroy, *Legislative Power in Canada*, pp. 255–7. It is hardly necessary to discuss these cases: there is no treaty with China imposing obligations as to immigration, as the Court seems to have held.

accepts a treaty to pass any legislation necessary to give it full force, and this has often been done, e. g. by the North American Colonies to carry out the provisions of the Extradition Treaty of 1842, of the Reciprocity Treaty of 1854, and of the Treaty of Washington of 1871, and by Canada in 1906, 1908 and 1911 to confirm the Japanese and French treaties. The Imperial Government has also often legislated to supplement Colonial legislation, as in the case of the Anglo-American Treaties of 1854 and 1871, and the Anglo-French Treaty of 1904. In the case of Newfoundland an Imperial Act to override Colonial legislation was proposed in 1891,[1] and only withdrawn on an undertaking being given by the Colonial Government that Colonial legislation would take place, and an Order in Council of September 9, 1907,[2] was actually passed, under the Imperial Act of 1819, to suspend the operation of certain Colonial legislation which was inconsistent with a *modus vivendi* of September 6, 1907, with the United States. This Order in Council was revoked in 1908 on the acceptance by the Colony of a *modus vivendi* pending the submission of the questions at issue with the United States to arbitration.

It is, of course, in each case a question of interpretation how far treaties extend to the Dominions. Thus Her Majesty's Government in 1875[3] held that British Columbia was not entitled to the benefits of the Treaty of Washington of 1871, as it had become part of the Dominion of Canada subsequent to that date. On the other hand, general treaties would clearly, on the accepted principle of international law, apply to territories acquired subsequent to the date of the treaty, as, for example, the Transvaal and the Orange River Colony. Certain difficulty might arise in such a case, for normally these Colonies, as self-governing Colonies, would have been given the option of adhering to treaties of a commercial character, whereas as it was they fell under the

[1] See *Parl. Pap.*, C. 6044, H. L. 76, C. 6256, 6334, 6365, 6488, 6637, 6703.

[2] *Parl. Pap.*, Cd. 3765, p. 168. Cf. Cd. 3262.

[3] Canada *Sess. Pap.*, 1876, No. 42, where the arguments of both sides are given. Cf. 1877, No. 100 (French duty on ships).

operation of treaties which were concluded at a time when responsible government was not known.[1]

The question of the relation of the Imperial and Colonial Governments with regard to the interpretation and the enforcement of treaties was raised in 1886 in connexion with the discussion of the rights of the American fishermen in Canadian waters.

In a note of May 10, 1886,[2] addressed to Sir Lionel West, Mr. Bayard, in discussing the question, wrote, 'The Treaty of 1818 is between two nations, the United States of America and Great Britain, who, as the contracting parties, can alone apply authoritative interpretation thereto or enforce its provisions by appropriate legislation.' He went on to urge that the seizure of certain vessels by the Canadian authorities 'would appear to have been made under a supposed delegation of jurisdiction by the Imperial Government of Great Britain, and to be intended to include authority to interpret and enforce the provisions of 1818, to which, as I have remarked, the United States and Great Britain are the contracting parties, who can alone deal responsibly with questions arising thereunder'. In a dispatch of July 23, 1886,[3] to Sir Lionel West, which was communicated on August 2 to Mr. Bayard, Lord Rosebery communicated to the United States Government a report of the Privy Council of Canada on the question. In that report it was pointed out that the authority of the Legislatures of the Provinces, and, after federation, of the Parliament of Canada, to make enactments to enforce the provisions of the Convention, rested on well-known constitutional principles. The Legislatures existed, as did the Parliament of Canada, by the authority of the Parliament of the United Kingdom of Great Britain and Ireland, and the Colonial statutes had received the sanction of the British sovereign, who, and not the nation, was actually the party with whom the United States made the Convention. The officers who were engaged in enforcing the Acts of Canada or the laws of the Empire were Her Majesty's

[1] Cf. Keith, *State Succession*, p. 21; Westlake, *International Law*, i. 67.
[2] *Parl. Pap.*, C. 4937, p. 37.
[3] Ibid., p. 85.

officers, whether their authority emanated directly from the Queen or from her representative, the Governor-General. The jurisdiction thus exercised could not therefore be properly described, in the language used by Mr. Bayard, as a supposed, and therefore questionable, delegation of jurisdiction by the Imperial Government of Great Britain. Her Majesty governed in Canada as well as in Great Britain; the officers of Canada were her officers; the statutes of Canada were her statutes based on the advice of her Parliament sitting in Canada. It was, moreover, an error to conceive that, because the United States and Great Britain were in the first instance the contracting parties to the Treaty of 1818, no question arising under that treaty could be 'responsibly dealt with' either by the Parliament or by the executive authorities of the Dominion. The raising of the objection was the more remarkable as the Government of the United States had long been aware of the necessity of reference to the Colonial Legislatures in matters affecting their interests. The Treaties of 1854 and 1871 expressly provided that, so far as they concerned the fisheries or trade relations with the provinces, they should be subject to ratification by their several Legislatures, and seizures of American vessels and acts followed by condemnation for breach of the Provincial Customs Laws had been made for forty years without protest or objection on the part of the United States Government.

In a note from Mr. Phelps to Lord Iddesleigh, of September 11, 1886,[1] no exception was taken to this view.

The question rose again in 1891–2 in connexion with the proposed arbitration as to certain questions of rights on the French shore. The French Government endeavoured to insist that all legislation and executive action for enforcing the award should be taken by the Imperial Parliament. This claim Lord Salisbury absolutely declined to admit. France was entitled, he held, to exact the punctual performance of the treaty obligation of Great Britain, but had no authority to insist on any special method.[2]

[1] *Parl. Pap.*, C. 4937, p. 120.

[2] *Parl. Pap.*, C. 6703, p. 47.

This view has now received the tacit approval of the Hague Tribunal in connexion with the North American Fisheries Arbitration, in their award of September 1910, where they recognize the right of Canada and Newfoundland to make laws regarding the fishery binding on Americans, and do not restrict that power to the Imperial authorities only.

On the other hand, it remains of course for the Imperial Government to decide what interpretation will be put on a disputed treaty. Thus, in 1907, that Government were unable to accept the view of the Government of Newfoundland that the meaning of the Treaty of 1818 with the United States regarding the fisheries was too clear to admit of dispute, and therefore refused to enforce its terms absolutely, without reference to the views of the United States Government.[1]

§ 2. The Arrangements for Separate Adherence to and Withdrawal from General Treaties by the Dominions, and for the Consultation of the Dominions in regard to such Treaties.

The original practice was to conclude treaties binding on all the dominions of the Crown, and as late as 1862 and 1865 the treaties with Belgium and with the North German Customs Union not merely bound all the Colonies, but provided for the grant of national treatment in the Colonies to the products of these foreign countries. In 1868 the Austro-Hungarian Treaty of Navigation still bound all the Colonies, excepting that in those Colonies in which the coasting trade was reserved for British ships the reservation was permitted to continue. The commercial Treaty of 1876 with Austro-Hungary applies in express terms to all the Colonies, and existing treaties with Norway and Sweden of 1826, with Switzerland of 1855, with Russia of 1859, with Bolivia of 1840, with the Argentine Confederation of 1825, and so forth, naturally included the Colonies.[2] In 1877 the question as to the propriety of concluding such treaties was raised, and

[1] *Parl. Pap.*, Cd. 3765.

[2] *Parl. Pap.*, Cd. 3395 and 3396.

the Secretary of State for Foreign Affairs agreed that commercial treaties should not be applicable to the responsible-government Colonies automatically, but that these Colonies should be given an option of adherence, usually within a period of two years.[1] The first treaty to contain a Colonial clause was apparently that with Montenegro of January 21, 1882. The Treaty of 1883 with Italy permitted the responsible-government Colonies to adhere within one year, the Treaty of 1888 with Mexico permitted the same Colonies, including Natal in view of the probable early grant of responsible government, and fixed the time for adherence at two years, and the same principle was laid down in the treaties of 1887 with Honduras and of 1891 with Muskat.[2]

The right of separate withdrawal was not then asked for, and it appears first in a Convention of July 15, 1899, with Uruguay, and in a Proclamation of February 3, 1900, with Honduras, which enabled Her Majesty's Government to terminate the Treaties of 1885 and 1887 with these states on giving six and twelve months' notice respectively on behalf of any British possession which might have adhered to the original treaties.

At the Colonial Conference of 1902 a resolution was passed in favour of restricting coastwise trade to those countries which permitted English ships to engage in coastwise trade, and in consequence of this Conference declarations were signed at Athens on November 10, 1904, and May 4, 1905, enabling the Treaty of 1886 with Greece to be terminated by a year's notice in respect of any of the adhering Colonies. In 1907 the resolutions of 1902 were reaffirmed, the Imperial Government dissenting in so far as the proposal was intended to regard as coasting trade the trade between the Mother Country and the Dominions. Before the Conference in 1906 Australia gave a preference to British goods imported in

[1] See Canada *Sess. Pap.*, 1883, No. 89.

[2] Cf. also the *Mail Ships Act*, 1891 (54 & 55 Vict. c. 31), which contemplates the agreement of the Colonies to the issue of Orders in Council bringing it into force (s. 8); Jenkyns, *British Rule and Jurisdiction beyond the Seas*, p. 91, note 2; below, p. 1126.

British ships manned by white labour. The Bill was reserved because of representations of the Imperial Government as to its conflicting with treaties (especially the Russian of 1859 and the Austro-Hungarian of 1868), and it did not come into operation. As a result of the incident and of the Conference, power was obtained in 1907–8, by negotiation with Paraguay, Egypt, and Liberia, to withdraw in respect of any self-governing Dominion on a year's notice.

It must not, however, be thought that by obtaining power to withdraw or to exempt self-governing Dominions from the obligations of treaties, those Dominions are by that fact shut out from the benefits of the treaties in question. The rights given by the treaties may be divided into two classes. In the first place there are rights which may be roughly described as political, such as privileges and exemptions in favour of consular agencies; the right to carry on internal commerce; exemption from compulsory military service; from judicial and administrative and municipal functions (other than those imposed by the laws relating to juries); exemption from contributions imposed as an equivalent for personal service; exemption from military exactions or requests, except compulsory billeting and other military exactions to which subjects of the country may be liable as owners or occupiers of real property; the right to acquire property movable or immovable; the right to dispose of property by inheritance and similar conditions. On the other hand, there are matters which are practically purely commercial, such as scales of import duties, and it is clear that a distinction must be drawn between the two classes. An Australian, for example, as a British subject, must be held to be entitled in Japan to all the privileges given to British subjects by the Treaty of 1911, although the Commonwealth is not bound by that treaty. On the other hand, it is equally clear that goods from Australia are not entitled to the special tariff granted by the Treaty of 1911 to goods from the United Kingdom, and as a matter of fact they are not accorded such treatment, and one of the great obstacles to the development of commercial intercourse between the Common-

wealth and Japan is the differential tariff imposed by the Japanese against places which have no treaty rights.

It may be argued, of course, that the position is somewhat one-sided, inasmuch as Japanese in the Commonwealth, for example, have no rights analogous to those of British subjects in Japan, but consideration shows that any attempt to avoid this result would lead to inextricable difficulties. In view of the constant intercourse between Great Britain and Australia it would be very difficult to define any basis on which an Australian subject could be distinguished from an ordinary British subject, and the Colony is penalized sufficiently for its lack of adherence by the tariff disabilities under which it labours in consequence.

In political matters proper there has been no attempt to obtain separate powers of adherence or withdrawal for the Dominions, and it is clear that such an attempt would be meaningless. It is impossible, as long as the Empire retains any unity, for one part to be treated in political questions differently from another part, and the separate adherence to and withdrawal from treaties is only possible as in commercial treaties, where a differentiation of treatment could be based upon a differentiation of locality. This remains true even in the most recent treaties, and in this case also the practice of consulting the Colonies has not yet been introduced save within somewhat narrow limits. Nor, as a matter of fact, have the Colonies put forward any formal claim to be given an option as to adherence in the case of general political treaties. Recent examples of political treaties concluded without consultation with the Colonies are the Hague Conventions of 1899 and 1907, the former of which, in the Convention relating to the laws of war, imposed certain obligations on the countries adhering: for example, as to free postage and exemption from customs dues for prisoners of war, to which effect could not be given without Colonial legislation, and the latter of which also required certain amendments in legal matters. Similarly in the case of the political conventions with Japan; the treaty with France of 1904 for the settlement of outstanding questions;

the later Convention of 1907 relating to the New Hebrides; the treaties with the Northern Powers for the maintenance of the *status quo* in the North Sea; the treaties with the Mediterranean Powers for the maintenance of the *status quo* in the Mediterranean; the general Act of Algeciras regarding Morocco of 1906, &c., no attempt has been made, nor could any attempt be made, to permit separate adhesion on the part of the Dominions. So even the new Extradition Treaty with Belgium of 1911 applies generally to the whole of the Empire. Thus also a Bill was introduced in the Imperial Parliament in 1910 to enable His Majesty's Government to carry out the Hague Convention, and another Bill to amend the law of Naval Prize, in order to render it possible for His Majesty's Government to accept the rules in the Naval Prize Convention[1] agreed upon at London in 1908 as a basis for the jurisdiction of the International Prize Court contemplated by the Hague Convention of 1907.

On the other hand, it is equally a fixed rule that in all possible cases the Dominion Governments should be consulted with regard even to political treaties which directly affect their interests. So far back as 1871, when the Treaty of Washington was negotiated, Sir John Macdonald was one of the British representatives and acted on behalf of Canada. Similarly it was laid down in a dispatch from Mr. Labouchere of March 26, 1857, that no addition would be made to the treaty burdens of Newfoundland without consulting the Newfoundland Government. Thus on two occasions, in 1857 and 1886, treaty arrangements with France have been dropped because of the objection of that Government, and the Treaty of 1904 with France, so far as it concerned Newfoundland, was based on the fullest consultation between the Colony and the Imperial Government, and the Imperial

[1] Cf. question asked in House of Commons, November 18, 1910; on the motion of the Commonwealth Government the Imperial Conference of 1911 discussed the Declaration of London and agreed to its ratification; see *Parl. Pap.*, Cd. 5513; 5745, pp. 34, 97–134; 5746–1, pp. 4–20. The Prime Ministers were also then consulted as to the renewal of the Japanese Alliance; see *House of Commons Debates*, xxviii. 1269, 1270, 1308, 1309, 1347, 1348.

Government in that treaty made very substantial sacrifices itself in money and territory in order that the burdens of the French rights in Newfoundland should be lessened. In 1906 and 1907, as the published correspondence[1] shows, every effort was made by the Imperial Government to secure the co-operation of the Newfoundland Government in negotiations with the United States for the settlement of a *modus vivendi* regulating the fisheries in Newfoundland waters, and it was after the fullest consultation and agreement with the Governments of Canada and Newfoundland that it was arranged in 1909 to submit the questions at issue with regard to the American rights of fishery to the Hague Tribunal. On the same principle the Commonwealth of Australia and the Dominion of New Zealand were consulted with regard to the proposed agreement with France as to the New Hebrides, though unfortunately in the case of these Dominions full co-operation was not secured. A representative of New Zealand, however, took some part in a later negotiation of the details of the arrangement, and in carrying out the arrangement steps have been taken to keep the Governments of the Commonwealth and New Zealand fully informed.

But by far the most striking example of arrangements for such consultation are the cases of the General Arbitration Treaties with the United States of America, that ratified on June 4, 1908, and that of August 1911, and the Pecuniary Claims Treaty of 1911, in which it is expressly provided that His Majesty's Government reserve the right, in the case of any questions affecting the interests of a self-governing Dominion, to obtain the concurrence of that Dominion in the special agreement which is required under the treaties for the reference to arbitration. The circumstances of that case are, however, peculiar. Under the Constitution the Senate occupies an anomalous position, inasmuch as its consent is necessary for the ratification of any treaty, and it does not feel itself in any way bound to accept a treaty because it has been made by the Executive Government. It is therefore reasonable to expect that the United States

[1] *Parl. Pap.*, Cd. 3262 and 3765.

Government should accept a similar stipulation with regard to the case of a Dominion, whereas it would hardly be reasonable to ask for a similar concession from other powers.

At the same time it must be recognized that there is a definite limit to such concessions. In the long run the Imperial Government must decide, inasmuch as it is upon the Empire that the results of any decision will fall, and therefore the central power must accept the responsibility and have the final authority, and this has been recently laid down in the correspondence of 1907 [1] with the Government of Newfoundland regarding the American fishery rights.

It may be added that the practice has of recent years been introduced of consulting the Dominions with regard to the case of general commercial treaties, in order to ascertain if there are any representations which it is desirable to make in the special interests of those Dominions. Thus in the Anglo-Greek agreement a special insertion was made of codfish in view of the interests of the Government of Newfoundland, and steps have been taken to secure the presence on the Advisory Committee of the Board of Trade of representatives of the self-governing Dominions.

§ 3. Commercial Negotiations with regard to the Dominions

His Majesty's Government has from an early date been anxious to assist the self-governing Colonies to secure by treaty commercial arrangements which may appear to them to be advantageous in their interests, and in respect of such negotiations have always desired to have the assistance of Colonial ministers familiar with the matters dealt with.

Reference may be made to the negotiation by Lord Elgin, then Governor-General, of the Reciprocity Treaty of 1854 with the United States in the interests of Canada, in which the Canadian Government were consulted in the fullest manner possible.

In 1865 Her Majesty's Government expressed their readi-

[1] Cf. *Parl. Pap.*, Cd. 3765, p. 179.

ness to accept Canadian assistance in negotiating a Treaty of Reciprocity with the United States.[1]

In 1871 Sir John Macdonald was one of the plenipotentiaries engaged in the negotiations for the Treaty of Washington, G. Brown negotiated with the States in 1874, while Sir Alexander Galt and Sir Charles Tupper, from 1877–84, on several occasions conducted negotiations for commercial treaties with Spain and France. It was at first proposed in such cases that the Colonial representative should be treated as being engaged in an informal negotiation, and that he should not actually sign the Convention when concluded, but this principle was abandoned almost immediately, and as early as 1884 it was contemplated that had the negotiations with Spain then on foot resulted in an agreement, Sir Charles Tupper, High Commissioner for Canada, should have signed the agreement together with His Majesty's representative at Madrid.

In 1888 Sir Charles Tupper actually signed with Mr. Chamberlain the Treaty of Washington, which was, however, not approved by the United States Senate, and therefore was never ratified.

In 1892 Canadian ministers with Sir J. Pauncefote conducted negotiations with the United States Secretary of State, but no settlement resulted.[2]

In 1893 Sir Charles Tupper negotiated a treaty with France which was finally accepted by both the French and British Governments. Sir Charles signed the treaty along with His Majesty's representative.[3]

In 1890 and 1902 Sir Robert Bond negotiated, through the Ambassador at Washington, with the United States Secretary of State. The former negotiation resulted in a Convention which was not proceeded with, owing to the opposition of the Canadian Government on the ground that it was hostile to the interests of Canada, but the negotiation of 1902 terminated in the signature of a Convention, which, however, never came into operation owing to the objections of the United States Government.

[1] See *Parl. Pap.*, C. 703, pp. 8 seq.; February 8, 1867, I, p. 13.
[2] Canada *Sess. Pap.*, 1893, No. 51. [3] Ibid., No. 52.

In 1907 Mr. Fielding and Mr. Brodeur, on behalf of the Canadian Government, negotiated a separate treaty with France which received the approval of His Majesty's Government, and which, as supplemented by a Convention of 1909, has been ratified by both Governments.

The principle regulating the conduct of such negotiations has always been as in the cases cited above—that His Majesty's Minister in the foreign Court concerned should be a plenipotentiary for the purpose of signing the treaty, and that the whole negotiation should be carried on under the supervision and with the approval of His Majesty's Government. The principles were laid down clearly in 1865,[1] and they were more fully expressed in a dispatch from Lord Ripon [2] conveying the decision of the Imperial Government with regard to the resolutions arrived at by the representatives of the self-governing Colonies at the Ottawa Conference of 1894, which laid down the following rules :—

Any agreement made must be an agreement between Her Majesty and the sovereign of a foreign state, and it was to Her Majesty's Government that the foreign state would apply in case of any questions arising under the agreement. To give the Colonies power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate and sovereign states, and would be equivalent to breaking up the Empire into a number of independent states, a result injurious equally to the Colonies and to the Mother Country, and one that would be desired by neither party. The negotiations, therefore, between Her Majesty and the foreign sovereign must be conducted by Her Majesty's representative at the foreign Court, who would keep Her Majesty's Government informed of the progress of the discussion, and seek instructions from them as necessity arose. In order to give due help in the negotiations, Her Majesty's representative should, as a rule, be assisted by a delegate, appointed by the Colonial Govern-

[1] *Parl. Pap.*, C. 703 ; see also Lewis, *George Brown*, p. 227 ; Canada, *House of Commons Debates*, 1887, p. 396 ; 1892, p. 1952 ; Ewart, *The Kingdom Papers*, pp. 68–72. [2] Ibid., C. 7824 ; 7553, pp. 53 seq., 147 seq.

ment, either as a plenipotentiary or in a subordinate capacity, as the circumstances might require. If, as a result of the negotiations, any arrangements were arrived at, they would require approval by Her Majesty's Government and by the Colonial Government and also by the Colonial Legislature, if they involved legislative action before the ratification could take place. This procedure had been in the past adopted, and Her Majesty's Government had no doubt as to its propriety, as securing at once the strict observance of existing international obligations and the preservation of the unity of the Empire. The exact mode in which the negotiations have been conducted was varied slightly in 1907 in the case of the negotiation of the French Treaty regarding Canadian trade in that year.[1] In the case of the previous Treaty of 1893, not only was the treaty signed jointly by the Ambassador and Sir Charles Tupper, but in the negotiation Sir Charles Tupper was assisted by Sir Joseph Crowe, who was attached to the Paris Embassy. On the other hand, in 1909, Mr. Fielding and Mr. Brodeur carried on negotiations directly with the responsible French officials, and it was only after an agreement had been practically arrived at that full powers were issued to the Canadian Ministers together with the Ambassador for the signing of the treaty. There was, however, it should be noted, a ground of convenience for the association of Sir Joseph Crowe with Sir Charles Tupper in the earlier negotiation. Sir Charles Tupper has told me that he desired the aid of an officer who could converse fluently in French, and as early as 1884 the Imperial Government were prepared to permit Sir Charles Tupper to negotiate directly with the Spanish representatives if he had so wished. In both cases, before the plenipotentiaries were authorized to sign the treaty the conditions laid down were carefully examined by the Imperial Government, and the treaty was of course subject to ratification by the Imperial Government.

[1] The claims of a real change made by the Liberal party in the Canadian House of Commons on January 18, 1908, repeated in the Imperial Commons on July 21, 1910 (xix. 1456-8), and by Ewart, *The Kingdom Papers*, pp. 6, 75, were completely refuted at the time by Mr. Foster, Mr. Borden, and Sir C. Tupper; see *Debates*, 1907–8, pp. 1265, 1384, 3517–22.

Since the conclusion of the French Treaty of 1907 and the similar supplementary arrangement of 1909, which was also negotiated by the Canadian ministers, Canada has concluded, in 1910, arrangements with Germany and with Italy regarding commercial matters. These arrangements were negotiated in Canada with the German Consul-General at Montreal, and with the Royal Consul of Italy. In both cases the negotiation resulted not in a formal treaty but merely in a provisional agreement made in consideration of the intention to conclude a formal treaty through the ordinary channel. The Canadian Government received the approval of His Majesty's Government for the conclusion of these Conventions, and the Canadian Government have expressly recognized that if any more formal arrangements are desired they should take the form of a treaty and be negotiated by plenipotentiaries duly appointed. In both cases the concessions agreed to by the Canadian Government were carried into effect by Orders in Council under the authority of the *Customs Tariff*, 1907.

In the case of the United States, in order to secure the grant of the minimum Payne tariff, the Canadian Government carried on in 1910, with the knowledge and approval of His Majesty's Government, negotiations with the United States Government. No treaty resulted from these negotiations, but the United States Government accorded the minimum tariff on the understanding that Canada would give concessions on certain articles, and the Canadian Government gave the concessions, not by special grant to the United States, but by lowering by Act of Parliament (c. 16) the tariff for the whole world.[1] In 1911 a much more comprehensive arrangement was made at Washington, amounting to a limited reciprocity, thus fulfilling Canadian views of old standing. The arrangement was to be carried out by reciprocal legislation, and not treated as a treaty proper. The Ambassador was kept informed of its progress, and everything done by the Canadian ministers to avoid serious injury to British trade.[2]

[1] See for Germany the Order in Council of February 15, 1910, cancelling the surtax imposed on German goods by Order in Council of November 28, 1903; *Canada Gazette*, xliii. 2438. For Italy, Belgium, and Holland, see the Orders in Council of June 7, 1910. [2] See below, pp. 1143 seq.

In the case of Belgium and Holland no agreement has been made by Canada, but on the representations of the two Governments concessions have been made to them by Order in Council in 1910, in view of the fact that in both countries Canadian products receive favourable treatment.

It will be seen that in no case has Canada concluded a treaty with a foreign power direct; that in two cases provisional arrangements have been made of an informal character expressly in contemplation of formal arrangements, and that even in these cases the approval of His Majesty's Government has been obtained, while in one case an agreement for reciprocal legislation was arranged.

Similarly in 1909 Lord Selborne, as Governor of the Transvaal, with the approval of His Majesty's Government, made an arrangement with the ex-Governor-General of Mozambique with regard to the recruiting of labour for the Transvaal mines, railway rates, &c.

The principles which must regulate the substance of such conventions are laid down in the dispatch from Lord Ripon of June 28, 1895,[1] to which reference has been made above; no modification has been made in the position since. These principles reiterated in 1907[2] are :—

(1) That no foreign power can be offered tariff concessions which are not at the same time extended to all other powers entitled in the Dominion to most-favoured-nation treatment. This is provided for by law in the Constitution Act of New Zealand,[3] and was formerly so provided in the Constitution Acts of the Australian Colonies;[4] and even were this not the case it is obvious that His Majesty could not properly enter into an engagement with a foreign power inconsistent with his obligations to other powers, and before any convention or treaty can be ratified it is necessary that His Majesty's Government should be satisfied that any legislation for giving effect to the treaty engagements should make full provision for enabling His Majesty to fulfil his obligations both to the power immediately concerned and to any other

[1] *Parl. Pap.*, C. 7824, pp. 16 seq. [2] *Parl. Pap.*, H. C. 129, 1910.
[3] 15 & 16 Vict. c. 72, s. 61. [4] 13 & 14 Vict. c. 59, s. 31; 36 & 37 Vict. c 22.

powers whose treaty rights might be affected. This principle was fully accepted by Canada in respect of the French Conventions of 1907 and 1909, and similarly in respect of the concessions made to Germany, the United States, and Italy in 1910, and proposed to the United States in 1911.

(2) Further, His Majesty's Government regard it as essential that any tariff concession conceded by a Dominion to a foreign power should be extended to the United Kingdom, and to the rest of His Majesty's Dominions. It is clear that no Dominion would wish to afford to foreign nations better treatment than it accords to the rest of the Empire of which it forms a part. For example, when informal discussions with a view to commercial arrangements between the Dominion of Canada and the United States were conducted in 1892, the Dominion Government declined to agree that Canada should discriminate against the products and manufactures of the United Kingdom, and on this ground the negotiations were broken off.[1] Similarly, when Newfoundland in 1890 had made preliminary arrangements for a convention with the United States which would have accorded preferential treatment to that power,[2] Her Majesty's Government acknowledged the force of the protest made by Canada, and when the Newfoundland Government proposed to pass legislation to grant the concession stipulated for by the United States, the Secretary of State in a dispatch of March 26, 1892, informed the Dominion Government that they might rest assured 'that Her Majesty will not be advised to assent to any Newfoundland legislation discriminating directly against the products of the Dominion'.

(3) His Majesty's Government cannot agree to a Colony asking from foreign powers concessions hostile to the interests of other parts of the Empire. If, therefore, a preference was sought by or offered to a Dominion in respect of any article in which it competed seriously with the other Colonies or the Mother Country, His Majesty's Government would feel it

[1] See United States Senate, 52 Congress, Sess. 1, *Exec. Doc.* No. 114; *Canadian Gazette*, xviii. 603; Hopkins, *Sir John Thompson*, p. 402.

[2] Cf. *Canadian Gazette*, xviii, 482; *Parl. Pap.*, C. 6303, pp. 14 seq., 33 seq.

to be their duty to use every effort to obtain an extension of the concession to the rest of the Empire, and in any case to ascertain as far as possible whether the other Colonies affected would wish to be made a party to the arrangement. In the event of this proving impossible, and of the result to the trade of the excluded parts of the Empire being seriously prejudicial, it would be necessary to consider whether it was desirable in the common interests to proceed with the negotiation. His Majesty's Government recognize that they would not be justified in objecting to a proposal merely on the ground that it is inconsistent with the commercial and financial policy of the United Kingdom, but the guardianship of the common interests of the Empire rests with them, and they cannot in any way be parties to any arrangements detrimental to these interests as a whole. In the performance of this duty it may be necessary to require apparent sacrifices on the part of a Colony, but they are confident that their general policy in Colonial matters is such as to satisfy Colonial Governments that they would not interpose any difficulties without good reason in the way of any arrangements which a Colony may regard as likely to be beneficial to it.

All these matters have been carefully observed by Canada in commercial negotiations affecting the trade of that Dominion. All concessions made to foreign powers have been given to all the British Empire, and it was expressly stated by the Canadian Government in the Canadian House of Commons on January 14, 1908, that in drawing up the terms of the Treaty of 1907 they had aimed at securing that the preference given to France should as little as possible deal with articles in which there was a considerable trade between Great Britain and Canada, and that their aim was as far as possible to preserve the preference given to Great Britain while encouraging the trade with France. It might be added that the Canadian Government has maintained a similar principle, namely, that the United Kingdom should receive the benefits of any inter-colonial preference.[1]

[1] See the Report of the Royal Commission on Trade Relations between Canada and the West Indies, Cd. 5639, p. 21.

In 1911 the Canadian Government were ready to accept a trade preference on various articles from the United States, but on the whole mainly in articles in regard to which there was no serious competition with British interests; even that action excited much comment in Canada and in England,[1] and told against the Government in the election of 1911.

§ 4. Treaties as affecting Federation

In the case of the two federations of Canada and the Commonwealth, treaty matters are complicated by the fact that the powers of legislation and government are shared somewhat differently between the central and the Provincial or State Governments.

In the case of Canada, s. 132 of the *British North America Act* provides that the Parliament and Government of Canada shall have all powers necessary and proper for performing the obligations of Canada, or of any province thereof as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries. The clause appears to be interpreted to mean, and must apparently have meant, at least as regards treaties concluded before 1867, that the existence of a treaty, whatever the subject-matter, conferred full powers upon the Dominion Parliament. Under constitutional practice, however, the Canadian Government does not adhere to new treaties where the matter concerned is one which is within the exclusive legislative competence of the provincial legislatures unless the Provincial Governments consent to such adherence. Thus the Dominion Government has not adhered to the Convention between the United Kingdom and the United States of America, relative to the disposal of real and personal property, though the topic might have been held to fall under the power to legislate as to aliens under s. 91 of the *British North America Act*, 1867, or to the Convention for the prohibition of the night-work of women, or to the Convention with France as to automobiles, as all the Provincial Governments were not prepared to adhere.

[1] See Imperial *House of Commons Debates*, xxi. 342, 493 seq.

It is very possible, however, that the Dominion Government could adhere even when it had no specific legislative power,[1] and by adherence obtain such power, and the objection that the Dominion Government would thus be enabled to override a Provincial Parliament within its own sphere of activity would seem to be met adequately by the reply that a treaty can only be made by the Imperial Government, and that if the Imperial Government and the Dominion Government consider adherence desirable, the circumstances cannot be such as to justify a Provincial Government in declining to adhere. The position, therefore, is :—

(1) that adherence must be declared for the Dominion as a whole ;

(2) such adherence is constitutionally declared at the request of the Dominion Government alone, and

(3) under constitutional practice the Dominion Government in cases where the Dominion Parliament has no direct legislative power, will not normally adhere except with the consent of all the Provincial Governments, but

(4) it is probable in law that the Dominion Government could adhere in any case and by adherence obtain power to legislate.

In any case it is clear that it would rest with the Dominion Government to secure that the Provincial Governments observed treaty arrangements in which the Dominion Government had concurred, or which were otherwise binding.

The matter was considered in the Canadian Parliament on May 14, 1909,[2] in connexion with the treaty with the United States as regards waterways, and Mr. Borden quoted s. 132 of the *British North America Act*, adding that he did not know that any exact construction had ever been put upon

[1] Cf. the question of white phosphorus ; a Bill was introduced by Mr. Mackenzie King into the Dominion Parliament in 1911, and one objection to it was on grounds of jurisdiction, as it is desired to prohibit manufacture and sale as well as importation, in order to join the international convention as to it ; see *Debates*, January 19. But the power seems to be given, if not by s. 132, by s. 91 (2), which allows legislation as to trade and commerce, and the case seems to fall within the conception of that term contemplated by the Privy Council. [2] *Debates*, pp. 6644 seq.

the section, but that it would seem to him in the light of its language that there was at least grave doubt whether or not the Legislatures of some of the provinces of Canada must not be called upon by the Government to implement the provisions of the treaty in case it was ratified. Elsewhere also he indicated that the Government of Ontario ought to be consulted with regard to the treaty, and that the Government of Ontario would require to pass some of the legislation necessary before the treaty could come into effect.[1]

Sir Wilfrid Laurier did not, in dealing with the question, make any clear statement as to his views on the point of the position of the Government of Ontario, but he stated that Mr. Gibbons, by whom the treaty was negotiated, had instructions during the time that the negotiations were being carried on to confer with the Government of Ontario, because the Canadian Government realized that the Ontario Government were concerned, and very properly concerned, in a matter of this kind. In 1911, however, an Act was passed which in ratifying the treaty with the United States regarding boundary waters expressly abrogates all conflicting provincial laws.[2]

In the case of the Commonwealth the matter is by no means so simple or free from doubt, in view of the somewhat independent position of the states. The Constitution of the Commonwealth, as adopted, empowers by s. 51 (xxix) the Commonwealth Parliament to legislate regarding external affairs, but what power is given with regard to treaties by that clause is not known, for it has never been decided by the High Court or the Privy Council, and the wide interpretation of external powers which might seem natural is rendered somewhat doubtful by the fact that the Common-

[1] Cf. also the direct intercourse of the Ontario Ministry and Mr. Bryce, Ambassador at Washington, on this topic; *Canadian Annual Review*, 1908, pp. 309, 310. In 1911 in the reciprocity arrangement with America, the Canadian Government resolutely declined to agree to the free export of pulp from Canada since Ontario and Quebec forbade it, and disclaimed all desire to coerce the provinces—even if they could do so, which they did not claim to be able to do; cf. *Parl. Pap.*, Cd. 5512, 5516, and *House of Commons Debates*, 1910–11, p. 3389.

[2] See Canada *House of Commons Debates*, 1911, pp. 9337 seq.

wealth Constitution Bills of 1891 and 1897 included treaties with external affairs in the powers of the Commonwealth Parliament, but the words were omitted in the final Act.[1]

In the correspondence arising out of the Vondel case, Mr. Deakin, as Attorney-General of the Commonwealth, argued that the omission of the words made no difference to the legal position, but whether that is correct it is impossible to say. In any case, it is clear that no treaty can be adhered to except with the assent and at the request of the Commonwealth Government. Nor does it seem doubtful that in matters within the legislative competence, whether exclusive or paramount, of the Commonwealth Parliament, it would be legitimate to adhere to any treaty at the request of the Commonwealth Parliament alone. On the other hand, it is impossible to be certain what is the position in cases in which the Commonwealth has no direct legislative power. In those cases, while the assent of the Commonwealth to any adherence is obviously constitutionally necessary, could the Commonwealth adhere without the assent of any particular state,[2] and if so would it have legislative power under s. 51 (xxix) to make good its adherence? It appears that where the Commonwealth has not exclusive or paramount power, it might adhere for some states who so desire, and not for others, but where the Commonwealth has power, presumably it would adhere as a whole or not at all. But it is possible that in any case the Commonwealth would not be willing to adhere partially, as this might be held to result in a discrimination between the states, which is contrary both to the spirit and the letter of the Commonwealth Constitution.

[1] Quick and Garran, *Constitution of Commonwealth*, pp. 622 seq., restrict its effect—probably rightly—to the power to deal with the appointment of external agents (e. g. the *High Commissioner Act* of 1909), the conduct of Commonwealth business alone, and such matters as extradition (though the latter power has been questioned as regards fugitive offenders; see *McKelvey* v. *Meagher*, 4 C. L. R. 265), e. g. the *Extradition Act*, 1903. No Fugitive Offenders Act has yet been passed. The views of Lefroy (*Law Quarterly Review*, 1899, p. 291), Jethro Brown (ibid., 1900, p. 26), and Harrison Moore (ibid., p. 39) are clearly wrong. Cf. above, p. 802.

[2] Cf. Harrison Moore, *Commonwealth of Australia*,[2] pp. 461, 462.

It is clear that the treaties which were binding on the states before federation remain binding on the Commonwealth in respect of these states after federation. That has been recognized by the fact that the Anglo-Japanese Treaty of 1894, as applied to Queensland by the protocol of 1897, was denounced at the request of the Commonwealth Government.

The same doctrine of the continuing effect of treaties binding on Australian States before federation has been laid down by the Secretary of State in the case of the Anglo-French Declaration of 1889 respecting wreck, and of the adherence of all the Australian States, save Victoria, to the Anglo-French Mailship Convention of August 30, 1890.[1]

The case of South Africa presents no difficulties: the Union power of legislation is paramount (9 Edw. VII. c. 9, s. 59), and the Union takes over the burden of any treaty binding upon a Colony at Union (s. 148) in respect of that territory.

§ 5. The Ratification of Treaties

The legal theory is that the Crown makes treaties and ratifies treaties on its own responsibility without reference to Parliament. The theory is no doubt correct, but in practice it has been of late years considerably modified. In the first place, in deference to considerations of political expediency, important changes, such as those of the cession of Heligoland in 1890 and the French Convention of 1904, have been made subject to the approval of Parliament. Secondly, the Government have hesitated to ratify treaties which would have altered the law of the land without first obtaining the necessary alteration of the law. Good instances are the cases of the Copyright Act of 1886, passed to render possible adherence to the Convention of Berne, and the similar Bill introduced in 1910 and again in 1911 to render possible ratification of the Berlin Convention of 1908. Again, in the session of 1910 Bills were introduced to allow of the ratification of the Hague Conventions of 1907.

Moreover, even in the case of treaties which do not require any alteration of the law, as in the case of the International

[1] Cf. *Parl. Pap.*, Cd. 3891, p. 6; 4355, p. 12.

Naval Convention of 1909, a promise was given to Parliament that there should be an opportunity of discussing the proposed convention before it was finally ratified, and the convention in question was not ratified until it had been laid before the Imperial Conference of 1911.[1]

The new arrangements are perfectly natural. In the eighteenth century, when the doctrine was accepted that treaties rested on the responsibility of the Executive, there was always the possibility of the impeachment of ministers.[2] This is no longer feasible in the twentieth century, and when there is any doubt as to Parliament approving the action of the Government it is obviously desirable that there should be avoided the possibility of the country being placed in the position which would be involved by its accepting a treaty obligation which the Parliament would be unwilling to carry out. Parliament would thus be placed in a false position : if it declined to pass the necessary legislation the Government would be unable to make good its acceptance of the treaty, and Parliament is accordingly compelled either to carry out what it does not approve or place the country in the position of having failed to make good an international obligation formally undertaken.

In the case of the Dominions, quite early treaties were concluded and ratified which, however, could only come into effect on the passing of the necessary legislation by Colonial Parliaments. For example, the reciprocity treaties with the United States of 1854 and 1871 respectively were in the main part dependent for their coming into effect on the passing of legislation by the Imperial Parliament and the Colonial Parliament of Canada, on the one hand, and the United States Congress on the other hand.

Similarly, the treaty of 1857 with France regarding French fishery rights in Newfoundland was ratified by the Imperial Government, but could only come into force on the necessary legislation being passed by Newfoundland and by the Imperial Parliament. The Newfoundland Government and

[1] See *Parl. Pap.*, Cd. 5745, pp. 97–134 ; *House of Lords Debates*, March 8, 9, and 13, 1911. [2] Cf. Anson, *Law of the Constitution*, II. ii. 104.

Parliament declined to pass such legislation, and therefore the treaty remained a dead letter.

The Treaty of Washington of 1888, which never came into force, contained in Article XVI a provision for ratification by the Queen after receiving the assent of the Parliament of Canada and of the Legislature of Newfoundland.

This was adopted in accordance with the precedents of 1854 and 1871, but the nature of the treaty rendered it clear that legislation both in Canada and Newfoundland would be necessary before the treaty could have any effect.

The question of submitting treaties before ratification to Dominion Parliaments was further discussed in 1909 in connexion with the treaties concluded at the beginning of that year with the United States Government.[1] Some unfavourable comment had arisen in the Canadian House of Commons because no copy of the Boundary Waters Treaty was available, though the treaty was before the United States Senate. At the same time comment was made in the Canadian Press which implied that the Canadian Government had been in some degree ignored in the negotiations. In a telegram from the Secretary of State of January 29, which was read in the Canadian House of Commons, it was pointed out that there was a misunderstanding as to the presentation of the treaty to the Dominion Parliament. The treaty-making power in Great Britain was the King, acting on the advice of his responsible ministers in the United Kingdom, who, in the case of treaties affecting a Dominion, acted in full consultation and accord with the Government of that Dominion. In the United States the treaty-making power was the President by and with the advice of the Senate, and until the Senate had approved, publication in the United States or in the United Kingdom was not customary. The United States Senate stood, therefore, in a different position from either the Imperial or the Canadian Parliament.

The question as to how far it is desirable that treaties should be approved by Dominion Parliaments was also discussed in the Canadian House of Commons on May 14,

[1] See *Canadian Annual Review*, 1909, pp. 29, 30, 183, 184.

1909, in connexion with the treaty with the United States as regards waterways. Mr. Borden expressed then the opinion that a treaty of the kind in question should be made subject to the ratification and approval of the Dominion Parliament, and he expressed the hope that if the treaty in question were revised and another brought down at a subsequent session, it should be made subject to the approval of Parliament. It could not be carried into effect without the legislation of the Parliament or without the legislation of some of the Provinces of Canada. Therefore the treaty should be subject to the ratification and approval of Parliament in order that it might be fully discussed by the representatives of the people before it became binding on the people. He alluded to several instances in which this course was taken, including the Treaty of 1888 with the United States regarding fishery and other matters. It was signed on February 5 and laid before the Canadian Parliament on March 7. The most authoritative textbooks laid it down that treaties should be made subject to the approval of Parliament in cases :—

(1) Where they imposed any burden on the people ;

(2) Where they involved any change in the law of the land ;

(3) Where they required legislative action to make them effective, or where they affected the free exercise of the legislative power ;

(4) Those affecting territorial rights.

He pointed out that Sir William Anson in the last edition of his *Law of the Constitution* (1908) [1] had omitted the criticism formerly passed on the approval by Parliament of the Heligoland Treaty of 1890 ; while Mr. Lowell in his new work on the *Government of England* [2] expressed the view that without the sanction of Parliament a treaty could not impose a charge upon the people or change the law of the land, and it was doubtful how far without that sanction private rights can be sacrificed or territory ceded. Mr. Borden pointed out that the Waterways Treaty must have the effect of altering the law of the land if carried into effect. New laws were required with regard to actions brought by people in Canada against

[1] II. ii. 107, 108 ; see *Debates*, pp. 6647 seq., 6523. [2] i. 22.

people residing in the United States, or by people in the United States against people domiciled in Canada. It sacrificed private rights to a certain extent, and in regard to various parts of the boundary waters it made a cession of territory. The Heligoland Treaty of 1890 and the Anglo-French Treaty of 1904 were both made subject to the approval of the Parliament of Great Britain. The Japanese Treaty of 1906, and the French Treaties of 1907 and 1909 had been made subject to the approval of the Canadian Parliament, and he thought that it would be the wiser course, in dealing with matters of this kind, to make such treaties subject to the approval of Parliament. It would have the additional effect of avoiding the unfortunate occurrence when the treaty was published in full in nearly every newspaper in Canada and the United States, when it was not officially before the Senate of the United States, nor officially before the representatives of the people of the country. In 1911 Sir W. Laurier promised to lay the Pelagic Sealing Convention of that year forthwith before the House of Commons.

§ 6. Foreign Relations other than Treaty

In matters of foreign concern other than treaty, the position of the Imperial and the Dominion Government is perfectly simple. It is clear that it is to the Imperial Government that foreign Powers must look for redress of any wrong to their subjects. It is, of course, natural that representations should also be made locally, but if any formal action is required it must be made through the appropriate diplomatic channel—either the British representative at a foreign Court or the foreign representative at the Court of St. James's. The position is neatly illustrated by what happened in the case of the riots of Vancouver in 1907. Formal representations for redress were made to the Imperial Government from the Governments whose nationals suffered in the riots, and in addition the Canadian Government were in informal communication with the Japanese Consul-General, and Sir Wilfrid Laurier, with the approval of the Governor-General, addressed to the Japanese Government through His Majesty's

representative at Tokio an expression of regret for the excesses which had occurred.[1]

The principles guiding the matter were formally laid down by the Imperial Government both in Lord Ripon's dispatch of June 28, 1895,[2] regarding the conclusion of commercial treaties and in the correspondence with the Governments of the Commonwealth of Australia and of the State of South Australia which arose out of the Vondel incident.[3] It is in that dispatch emphasized that the responsibility in these matters rests with the Imperial Government in the long run, but that the Imperial Government is entitled to look to the Dominion Government for the carrying out faithfully of all treaty and other foreign obligations. As a matter of fact, the Imperial Government retains no direct control over a Dominion Government, however much the actions of that Government might affect foreign relations. The Imperial Government recognized to the full this position when they granted responsible government; they felt that it must be assumed that a community that was fit to manage its own internal affairs could be trusted to carry out an obligation which, as part of the Empire, it had towards foreign countries under treaty or under the general principles of international law.[4] For example, in the case of the riots at Vancouver the obligations to Japan might be held to arise not merely under the ordinary international law, but also under the Treaty of 1894 accepted by Canada under a special arrangement in 1906, while the obligations to China rested only on the ordinary international law. But both cases were treated precisely

[1] *Canadian Annual Review*, 1907, p. 391. For Higinbotham's exaggerated view of the Imperial responsibility, cf. Morris, *Memoir*, pp. 204–9, 219, 220.

[2] *Parl. Pap.*, C. 7824.

[3] *Parl. Pap.*, Cd. 1587, p. 14. See also Sir G. Reid in Commonwealth *Parliamentary Debates*, 1908–9, p. 853.

[4] Cf. Sir Wilfrid Laurier's eloquent assertion in the Canadian House of Commons on March 7, 1911, of the duty of Canada to approve the reciprocity arrangement by legislating as contemplated therein as in accordance with its national honour, in view of the understanding with President Taft, loyally carried out on his part by convening a special session of the Congress of the United States.

alike, and compensation was paid to the victims of the riots in question.

It results from their position as parts of the Empire that the Dominions have no status as international entities. Accordingly no ministers are accredited to them, and the Consular officers who are accredited to the Governments are not invested with any diplomatic status as a general rule, though no doubt in particular cases, as in the case of the agreements in 1910 made by Canada with the German Consul-General and the Royal Consul for Italy with regard to trade matters, the Consuls are for the time being permitted to hold a position which is semi-diplomatic, though not completely so. But Consuls are entitled in the Dominions to no diplomatic privileges, though they receive certain courtesies,[1] mainly in the shape of the exemption from customs duties for stores for their official use, in cases where the Consul is not a British subject engaged in trade in the Dominion. It is provided also by the Colonial regulations that communications from the Governor to a foreign Consul or Consul-General should be signed, in the case of a Colony having responsible government, by the Governor's Private Secretary.

In some minor matters a certain degree of independent recognition is ascribed to the Dominions. Thus in postal matters the Dominions are represented at postal conferences and have votes like the Imperial Government itself, and the same remark applies to the Radio-Telegraphic Convention.[2] Under that convention it is probable His Majesty's Government will obtain at conferences the same number of votes as is accorded to the British Empire under the Postal Union Convention of Rome, namely six.

[1] Lord Dudley refused to accord Consuls in Australia the private entrée (*Daily Telegraph*, October 5, 1908), and the same rule has been adopted in South Africa; for Canada, see *House of Commons Debates*, 1909–10, pp. 853–5; 1910–11, pp. 973–80. The consent of a Government is always asked for the appointment of a Consul; see e.g. the case of Chinese Consuls in New Zealand, *Parl. Pap.*, 1908, A. 1, pp. 3, 4.

[2] New Zealand *Parl. Pap.*, 1908, A. 1, pp. 3, 4. On such matters direct correspondence with foreign Governments is allowed, e.g. New Zealand *Parl. Pap.*, 1910, F. 7.

At the Conference on Electrical Units and Standards held in London in October 1908, votes were accorded to Canada and Australia, as well as to India. Moreover, at minor Conferences all the Dominions, including the State Governments, are sometimes represented, and have votes, but these are business matters, and in postal and telegraphic matters direct communications with foreign Governments have long been approved by the Imperial Government. It would be a completely different thing to approve direct communications on political matters or the direct negotiation of treaties proper, and it would clearly be in theory a termination of the existing unity of the Empire, and the fundamental alteration of its Constitution.[1] But the strict theory allows of a good deal of latitude: thus in 1904 the Australian Government agreed to give Japanese merchants, students, and tourists certain facilities in entering Australia,[2] just as Queensland had done in 1900, in both cases by direct negotiation with the Japanese Consul, and the negotiations between Canadian Ministers and the German Consul-General, the Royal Consul of Italy, and the American Secretary of State were all direct, though they did not result in treaties technically so called, and in the latter case the Ambassador was consulted, while in all cases Imperial approval was accorded. In fact, the present day recognizes both formal treaties and informal agreements as being part of the foreign relations of the Dominions.

The question of the relations between the Dominions and His Majesty's Government with regard to foreign affairs was considered at great length in connexion with the Western Pacific. Australia and New Zealand were naturally deeply interested in the large number of islands scattered through the Western Pacific. In the quite early days strong representations were made in favour of the annexation of islands to Great Britain. The matter was elaborately discussed in connexion with the question of the annexation of Fiji, and the Imperial Government decided in 1874 to acquire control over the group.

[1] Cf. Amery, *United Empire*, i. 487 seq.

[2] Commonwealth *Parl. Pap.*, 1905, No. 61. Cf. Canada *Sess. Pap.*, 1910, Nos. 10 g, h, i, j.

In the autumn of 1874, Lord Carnarvon, then Secretary of State for the Colonies, suggested to the Governments of New South Wales, Victoria, Queensland, and New Zealand, that as they were specially interested in the annexation which had been decided upon in Australian interests, they should recognize their position by the payment of a small annual sum, not to exceed in any case £4,000, towards the probable deficit in the local revenue.[1]

New South Wales was ready to consider the suggestion, but the Government of Queensland was not prepared to make any contribution. Victoria was somewhat reluctant, and New Zealand would not contribute without a voice in the direction of the administration. The Imperial Government accordingly took the full burden of the expenditure upon itself, and abandoned the proposal of obtaining financial assistance with regard to Fiji.

The question, however, was raised in a new form in 1875 by recommendations from the Governments of New South Wales, South Australia, and Queensland in favour of the annexation of New Guinea.[2] In a dispatch of December 8, Lord Carnarvon indicated the view taken by His Majesty's Government with regard to the whole position. It was contended that the possession of New Guinea and of other Western Pacific Islands would be of value to the Empire generally, and conduce specially to the peace and safety of Australia and the development of Australian trade, and the prevention of crime throughout the Pacific, and that the establishment of a foreign power in the neighbourhood of Australia would be injurious to British, and more particularly to Australian interests. He laid stress upon the fact that no offer had been made to contribute towards the cost of the administration of the territory it was proposed to annex. The only interest which would accrue to the Empire at large, as far as he could see, was the advantage of Australia. England had done enough to discharge her duty of main-

[1] See *Parl. Pap.*, C. 1566, Appendix, pp. 85, 86. Cf. Quick and Garran, *Constitution of Commonwealth*, pp. 637 seq.

[2] See *Parl. Pap.*, C. 1566; Rusden, *Australia*, iii. 603 seq.

taining order throughout the Western Pacific Islands by the establishment of a High Commission under the *Pacific Islanders Protection Acts* of 1872 (c. 19) and 1875 (c. 50). As regards foreign annexation, the United States and Germany were then not prepared to make any annexations, and accordingly he considered that the time had not yet come for any annexation to take place.

On the whole, Lord Carnarvon's views appear to have received considerable approval in the Colonies at the time. It was recognized both by the *Sydney Morning Herald*, the *Sydney Mail*, and the *Argus*, that a request for annexation without readiness to bear any cost was hardly legitimate. The Government of Victoria, after careful consideration, thought that it was a matter for Imperial consideration, that it did not press for immediate settlement, and that the Parliament of Victoria would not be willing to make an appropriation of Colonial funds in favour of the expenditure. The Government of New Zealand were more ready to make a contribution. Sir Julius Vogel thought it was a new feature, but held that a great deal of weight might be attached to the view that the Imperial Government have the right to consider that advice voluntarily given by the Colonies, unsupported by any assistance, was, to say the least, not entitled to much consideration if it be made on the ground only of Imperial concern. He recognized with great satisfaction the annexation of Fiji, and he held that if any request for further annexations were made, as in the case of the Navigator Islands, pecuniary assistance should be offered, with, of course, the consent of the Parliament of New Zealand. He expressed his readiness to communicate with the Australian Colonies with a view to securing concerted action, but he admitted that such action was very improbable.

The matter remained more or less quiescent until 1883, when anxiety as to foreign movements caused a strong demand to be expressed in Australia for annexation. Steps were actually taken by the Government of Queensland to annex a portion of New Guinea without authority from

the Imperial Government. This step was repudiated, the Imperial Government then being assured that there was no intention on the part of Germany to claim any portion of the island. Unfortunately circumstances shortly arose which showed that Germany had other intentions. Lord Fitz-Maurice in his *Life of Earl Granville* shows how the Egyptian policy of the Government resulted in its requiring to consider most carefully the wishes of Germany, and ultimately Germany annexed a large portion of New Guinea. British annexation of the remaining part followed, and there was a somewhat heated exchange of recriminations between Germany and Great Britain, while on the other hand, the Australian Colonies were indignant at the supineness of the Home Government. But it must again be noted that the Australian Colonies had displayed at the outset reluctance to assume full pecuniary responsibility, and that the annexation of New Guinea was purely and solely a matter of Australian interest.[1] Similar reluctance to assume pecuniary responsibility had practically at the same time resulted in the acquisition by Germany of German South-West Africa. The Imperial Government were prepared to annex if the Cape Government would accept the responsibility of administration, nor were the Cape Government indisposed to do so, but the Government retired from office, and the new Government dealt with the matter so slowly that Germany succeeded in annexing the territory before effective steps could be taken for annexation.[2]

Difficulties arose also in connexion with Samoa and the New Hebrides. It was claimed by the Dominion Governments that the Imperial Government might have secured more effectively British interests in respect both of Samoa and the New Hebrides, while on the other hand, the position of the Imperial Government was laid down in a dispatch of

[1] See *Parl. Pap.*, C. 3617, 3691, 3814 (1883); 3839, 3863 (1884); 4217, 4273, 4290, 4441, 4584 (1884–5); 4656 (1886); 5564 (1888). Cf. also Dilke, *Problems of Greater Britain*, i. 437 seq.; Turner, *Victoria*, ii. 246, 333.

[2] See *Parl. Pap.*, C. 4190 (1884); 4262, 4265, 4290 (1884–5); 5180 (1887); Molteno, *A Federal South Africa*, pp. 82–6.

October 31, 1903, in which Mr. Lyttelton set forth his views on the question.[1]

Such feelings [' that in the Samoan arrangements the interests of Australia were too lightly regarded '] appear to His Majesty's Government to ignore the vast extent of territory in the Pacific Ocean which has been definitely brought under British control during the last thirty years. The whole of Fiji, some 88,000 square miles in the part of New Guinea nearest to Australia, almost all the great chain of the Solomon Islands, the Gilbert and Ellice Islands, the Cook group, and a large number of scattered islands have been added to the Empire during that short period. Most of those acquisitions have been made in consideration mainly (sometimes entirely) of the interests and sentiments of Australia and New Zealand. In the face of that record His Majesty's Government leave it to your Ministers to say whether the Government and people of this country have been unmindful of the wishes of their kinsmen in the Southern Seas.

Turning to the particular question of the New Hebrides, His Majesty's Government observe that your Ministers suggest that a definite attempt should be made to secure the possession of the Islands by some readjustment, whether of territory or of privileges, elsewhere. They must see, however, on reflection, that it would not be fair that a sacrifice should be made of another part of the Empire in deference to Australian wishes. Nearly thirty years ago Lord Carnarvon pointed out, in his dispatch of July 9, 1875, to the Governors of New South Wales, Victoria, Queensland, and New Zealand, that ' it would be impossible for a very large proportion of the taxpayers of this country to understand on what principle they should bear, whilst the Colonies immediately concerned should be exempted from, the burden of any expenditure that may be incurred in connexion with such places ' as Fiji or New Guinea. It would be no less difficult to explain to His Majesty's subjects in another part of the Empire why their interests should be sacrificed in order to obtain for Australia the whole of the New Hebrides.

His Majesty's Government have felt it their duty to put before your Ministers as plainly as possible a side of the New Hebrides question which is sometimes forgotten. They have constantly to remember the fact which your Ministers also recognize, that they are trustees for the whole of the

[1] *Parl. Pap.*, Cd. 3288, p. 64.

Empire, for this country, and for the other Colonies, as well as for Australia. They have to take into account not only the satisfaction which would be felt in Australia if the New Hebrides could be secured to the Empire by some concession elsewhere, but also the dissatisfaction which would be felt in that part of His Majesty's Dominions at whose expense the concession was made. His Majesty's Government have always recognized the debt which the Empire owes to the British race in the Pacific Ocean for its splendid loyalty and patriotism, never so conspicuously shown as during the late South African war; and they have given their reasons for thinking that the impression that the interests and wishes of Australia and New Zealand in regard to the Pacific Islands have not received the fullest consideration from the Imperial Government is not well founded.

The New Hebrides were destined to give further trouble.[1] In 1906 a Convention was held at London between representatives of the British and the French Governments to deal with the position of the New Hebrides by establishing a condominion in that group which recognized the equal rights of the French and the British Governments. Copies of this agreement were forwarded to the Governments of Australia and New Zealand in a dispatch of March 9, 1906.[2] The Government of New Zealand in reply objected to any proposal of a condominion, and suggested that concessions should be made elsewhere in order to secure the withdrawal of France from the group, or if that were impossible, that a partition of the group should take place. In a reply to this telegram, dated April 12, His Majesty's Government declined to consider the principle of making a concession of territory elsewhere, and pointed out that the Australian Government preferred joint control to a partition.

On June 14, 1906, the Governor-General of Australia addressed a dispatch to the Secretary of State, in which his ministers protested against the drawing up of a convention without their being consulted, and objected strongly to the whole scheme of the convention as well as criticizing the terms of the convention in detail.

A similar dispatch was addressed on July 21, 1906, to

[1] See *Parl. Pap.*, Cd. 3288 and 3525. [2] Cd. 3288, pp. 36 seq.

the Secretary of State by the Governor of New Zealand. In a telegram in reply of October 4, 1906,[1] the Secretary of State informed the two Governments that other interests than French or British were being created in the New Hebrides; that in order to avoid possible complications it had been suggested to the French Government that an immediate joint Protectorate should be proclaimed; that the French Government had declined to accept this proposal, and pressed for ratification of the draft convention. His Majesty's Government considered that the immediate ratification of the convention was the best course to adopt, but they desired to know the views of the two Governments. The Governments of both Australia and New Zealand declined to advise, being unable to judge either of the possibility of obtaining amendments or the risk of further delay, and they left the responsibility with His Majesty's Government. The Imperial Government accepted the responsibility and confirmed the convention, and in a dispatch of November 16, 1906,[2] the Secretary of State explained at length his views both as to the action which had been taken by the Imperial Government, and as to the relations of the Governments in matters concerning the Western Pacific. The following paragraph emphasizes his views as to the alleged inaction of the Imperial authorities :—

64. In paragraph 10 of his letter Mr. Deakin observes : 'The people of Australia and New Zealand feel that it is entirely due to the inaction of the Imperial Government that this step [i.e. the annexation of the New Hebrides by Great Britain] was not taken many years ago.' Your Ministers do not specify any particular instance of the 'inaction' to which they refer, and His Majesty's Government are not concerned to defend at this date the policy adopted by their predecessors more than a generation ago. But if it is meant to imply that the general policy of His Majesty's Government in the Pacific during the last thirty years has been wanting in energy or in desire to meet the wishes of the Australian Colonies, I need only refer you to the 9th, 10th, and 11th paragraphs of my predecessor's dispatch of October 31, 1903, with which my colleagues and I are in full agreement.

[1] *Parl. Pap.*, Cd. 3288, p. 50.

[2] Ibid., pp. 53 seq.

As for the New Hebrides in particular, I may point out that during the last twenty years at least it has been clearly impossible to discuss the future of the Group, except on the basis of an admitted equality of interests between this country and France ; and I may perhaps add that, according to the testimony of the High Commissioner for the Western Pacific, of the British Resident in the Group, and of Naval officers who have served there, one of the main reasons why British settlement and British influence in the Islands are not now as large as they might have been, is to be found in the operation of the Australian Customs tariff framed in 1901–2.

The views of the Secretary of State did not obtain the full approval of the Governments of the Dominions, and the question was raised again in 1907, when the Colonial Premiers attended the Imperial Conference.[1] It was found possible to obtain the assistance of the New Zealand Government in 1907 in drafting supplemental arrangements on matters of detail with the French Government.[2]

In the case of North America prior to 1906, constant complaints were made of British diplomacy, complaints echoed even by the Prime Minister. It was held, though recent investigation has shown without adequate ground, that the Imperial Government had sacrificed Canadian interests both in 1842 as regards the main boundary, and in 1846 as regards the boundary of British Columbia. As a matter of fact, the former treaty represented a very satisfactory compromise, for the negotiators of the Treaty of 1783 had hopelessly given away the British case, and nothing was left but to make the best, and a fairly satisfactory best, of a bad bargain.[3]

The settlement of the Columbian boundary was governed

[1] *Parl. Pap.*, Cd. 5323, pp. 548–63. [2] See *Parl. Pap.*, Cd. 3876, p. 23.

[3] See *House of Commons Debates*, 1907–8, pp. 3954 seq.; 1909–10, pp. 4762 seq.; *United Empire*, ii. 683 seq.; Macphail, *Essays in Politics*, pp. 247 seq. These papers form a necessary counterpoise to Hodgins's works, which are repeated by writers like Jebb without critical examination. Ewart, *Kingdom of Canada* and *The Kingdom Papers* (cf. *Canadian Annual Review*, 1909, pp. 179, 180), is biased by his enthusiasm for Canadian independence. See a sensible view in Henderson's *American Diplomatic Questions*. It is essential to remember that there are two sides to every dispute, and that in every case the United States have had strong arguments, even if to us they seem less cogent than our own.

by the actual facts and perhaps in some measure by the ill-advised action of the Hudson's Bay Company's representative in the west, but it was clearly not a surrender of Canadian interests on Imperial grounds.

The Reciprocity Treaty of 1854, negotiated by Lord Elgin, was unquestionably of the greatest advantage to Canada, and a striking proof of the anxiety of the Imperial Government in Canadian interests, and the regret with which its termination by the United States was greeted in Canada is conclusive proof of its value.

On the other hand, great feeling was caused by the conclusion of the Treaty of Washington in 1871. Sir John Macdonald was one of the plenipotentiaries, and he evidently felt that the British negotiators were too much inclined to sacrifice Canadian for Imperial interests.[1] On the other hand must be set the fact that Great Britain was prepared to make to the United States the enormous sacrifice involved in the agreement to arbitrate the Alabama claims on a basis which rendered a heavy liability inevitable. Moreover, the United States were at the height of their military power, having vast forces trained in the Civil War, Canada was practically defenceless, and the terms which were obtained for Canada cannot, on a calm review, be considered to have been unsatisfactory. The Behring Sea Arbitration,[2] in which Canada was successful in a large measure, satisfied the Canadian people, but this satisfaction was dispelled by the award in the Alaska boundary case.[3] It is easy now to regret that an arbitration should ever have been accepted which confronted three national arbitrators with other three national arbitrators, and to deplore the quixotic action of Canada in maintaining the impartial character of these arbitrators when three far from impartial arbitrators had

[1] Pope, *Sir John Macdonald*, ii. 104 seq. Cf. Morley, *Life of Gladstone*, ii. 401, n.; Ewart, *The Kingdom Papers*, pp. 65–7.

[2] See *Parl. Pap.*, C. 6918–22, 6949–51, 7107, 7161 (1893–4); C. 7836.

[3] See *Parl. Pap.*, Cd. 1400, 1472 (1903); 1877, 1878 (1904); 3159; Ewart, *Kingdom of Canada*, pp. 299 seq.; Sir W. Laurier in Canada *House of Commons Debates*, 1903, p. 14815; cf. 1892, pp. 1143, 1144; 1909–10, p 4705; *Canadian Annual Review*, 1903, pp. 346 seq.

been nominated by the United States. In the result the decision which was given against Canada depended on the vote of the Chief Justice of England, and the indignation felt in Canada was more serious than any previous exhibition of dissatisfaction with the Imperial Government.

The advent of Mr. Bryce as Ambassador, and the satisfactory conclusion of a long series of treaties to regulate the fisheries, the boundary waters, the international boundary, wreckage, the conveyance of prisoners, pecuniary claims, and above all the successful conclusion of the Arbitration as to the North American Fisheries, have induced in Canada a more favourable view of British diplomacy.

At the same time a new development of more importance has taken place in Canada, namely the practice of carrying on negotiations, informally indeed, but none the less important, with the consular representatives of foreign Powers. Ever since 1897 [1] the Japanese Consul-General has habitually communicated with the Imperial Government in the most formal manner regarding disabilities imposed by the Legislature of British Columbia on Japanese subjects. His representations have been supported by representations made by the Japanese Ambassador in London. In 1893 and in 1907 [2] the plan was still adopted by the Canadian Government of negotiating formally for commercial arrangements with France, the arrangements being concluded in a formal treaty signed by the Ambassador at Paris and by the Canadian Ministers in Canada. This plan was also adopted in 1909 in connexion with the supplementary arrangement with France, and in 1906 a formal convention was arranged by desire of Canada for adherence to the Japanese treaty of 1894.[3] But at the same time there has grown up a simpler procedure.

[1] See his letters in *Provincial Legislation*, 1896–8, 1899–1900.

[2] See *Parl. Pap.*, C. 6968, Cd. 3823. See also p. 1117, n. 1.

[3] The action of the Canadian Government in not securing a special concession as to immigration was in part due to an understanding with the Consul-General, but it exposed them to grave censure by the Opposition when the Vancouver riots broke out; see Part V, chap. iv; *Canadian Annual Review*, 1907, pp. 391–6; *Debates*, pp. 2025 seq.; *Parl. Pap.*, Cd. 3157.

At the beginning of 1910, Mr. Fielding, Canadian Minister of Finance, undertook informal negotiations with the German Consul-General at Montreal in connexion with the surtax of $33\frac{1}{3}$ per cent. imposed on German imports into Canada, which had formed the subject of informal negotiations in earlier years.[1] In this case, however, an agreement was come to on February 15. This agreement was avowedly provisional, and contemplated a formal convention at a later date, but no such convention has yet been made.

Similarly negotiations were carried on in the same year with the Italian Consul, and an informal arrangement, which, however, the King of Italy formally approved, was agreed upon. Again direct negotiations took place between Canada and United States representatives in 1910 with a view to the concession to Canada by the United States of the minimum rates under the Payne tariff, which was ultimately arranged, and in 1911 an elaborate reciprocal arrangement was made between Canada and United States representatives dealing with the same question. In that discussion it was expressly agreed that there should be no formal treaty, but that there should be legislation on either side, bringing the agreement into effect. It should be noted, however, that in this case His Majesty's Ambassador was kept informed of the process of the negotiations, while in the other the Imperial Government had full knowledge and gave consent.[2]

Simultaneously with the reciprocity negotiations, arrangements were made between representatives of Canada and the United States, the Ambassador being made party, for the settlement of the outstanding differences in the North America Fisheries Arbitration.[3]

The conclusion of the reciprocity arrangement[4] with the

[1] See *Parl. Pap.*, Cd. 1781, a reprint of a Canadian Sessional Paper.

[2] *Canadian Annual Review*, 1910, pp. 618–21. There was a proposal for a Canadian attaché in 1892 ; see *House of Commons Debates*, pp. 1950, 2463. But this was rejected then and also on December 15, 1909, by Sir W. Laurier (*Debates*, pp. 1582–5), and Mr. Lemieux on February 21, 1911 (p. 4109), eulogized the Ambassador's aid.

[3] Canada *Sess. Pap.*, 1911, No. 97.

[4] *Parl. Pap.*, Cd. 5512, 5516, 5523, and 5537 ; *House of Commons Debates*, January 26, February 9, 14, 21, 23, 28 ; March 7, 8 ; July 26, 28, 1911.

United States naturally produced elaborate discussion in the United Kingdom, and served as a basis for an amendment to the address in reply to the King's Speech on the opening of Parliament in February 1911. But it is no new policy in Canada: it is the sequel of many years of steady progress.

Reciprocity with the United States, which is naturally called for by the proximity of the States, has been the subject of tentative efforts from very early times, and a considerable measure of reciprocity was secured in 1854 by Lord Elgin's treaty. Up till 1866, when the treaty terminated at the instance of the United States, the policy of reciprocity was accepted by every party in Canada, and the efforts of the Dominion Government, which came into existence in 1867, were devoted to securing a continuance of the arrangements.[1] For that purpose steps had been taken in anticipation of confederation in 1865 by Mr. Galt and Mr. Howland, but these efforts were unsuccessful. In 1868 the first tariff of the Dominion was adopted, which included in the schedules an offer of reciprocity in natural products, which, with modifications to suit changed circumstances, was a feature of all Canadian tariffs down to 1894. In 1869 the Canadian Minister of Finance in Sir John Macdonald's Government made offers to Washington which amounted to an offer of a very considerable degree of reciprocity, but these offers were rejected. In connexion with the negotiations of the Treaty of Washington in 1871, Sir John Macdonald, with the approval and assistance of the Imperial Commissioners, offered to concede access to the Deep Sea Fisheries of Canada in return for a renewal of the treaty of 1854, but this offer was also rejected.

Sir John Macdonald resigned in 1873 in connexion with the Pacific Railway scandals, and the Liberal Ministry which succeeded him, in accordance with the national policy, which

[1] Pope, *Sir John Macdonald*, and Willison, *Sir Wilfrid Laurier*, supplement each other's accounts of these transactions. See also Biggar, *Sir Oliver Mowat*, ii. 567–634; Hopkins, *Sir John Thompson*, pp. 273–89; Canada *Sess. Pap.*, 1885, No. 34; *House of Commons Debates*, xxi. 295 seq., 457 seq.; Sifton in *Toronto World*, August 23, 1911.

they held as keenly as he did, approached the United States for a renewal of the treaty of 1854. Mr. Brown negotiated with the assistance of Sir Edward Thornton, then British Minister to the United States at Washington, and eventually a draft treaty for twenty-one years was framed. The treaty embraced a very wide range of reciprocity, striking off all the duties on numerous manufactured articles, and putting lumber, coal, and all farm produce on the free list. But the draft treaty was not even considered by Congress; it reached the Senate only two days before adjournment, was taken up in secret session, and returned to the President with the advice that it was inexpedient to proceed with its consideration.

Sir John Macdonald returned to office in 1878, and proceeded to develop the policy of protection which had helped materially to win the election. 'A National Policy of Protection,' he said in that session, 'will prevent Canada from being made a sacrifice market, will encourage and develop an active inter-provincial trade, and moving as it ought to do in the direction of reciprocity of tariffs with our neighbours so far as the varied interests of Canada may demand, will greatly tend to procure for this country eventually reciprocity of trade.' The Canadian tariff of 1879 still embodied the standing offer of reciprocity in natural products, but of course the United States were not prepared to accept anything so limited as that.

It must not be thought that Sir John Macdonald's Government in adopting protection desired to prevent reciprocity with the United States. When the fishery clauses of the Treaty of Washington were terminated at the instance of the United States in 1885, the Canadian Government granted to American vessels the fishing privileges enjoyed under the treaty until the close of the season. This agreement was arrived at on the understanding that circumstances afforded a prospect of negotiations for the development and extension of trade between the United States and British North America. Mr. Foster, Minister of Marine and Fisheries, expressed the hope that renewed negotiations would be carried on with

the result of establishing extended trade relations between the Republic and Canada. Sir Charles Tupper, in private correspondence in 1888 with Mr. Bayard, stated that the one way to attain a just and permanent settlement was by a straightforward treatment and a liberal and statesmanlike plan of the entire commercial relations of the two countries. Sir Charles Tupper therefore proposed to the United States that the Fishery arrangements and the Treaty of Washington should be continued in consideration of a mutual arrangement providing for greater freedom of commercial intercourse between the United States, Canada, and Newfoundland. This unrestricted offer of reciprocity, as Sir Wilfrid Laurier interpreted it, was rejected by the United States.

The Liberal party had naturally throughout maintained its attitude in favour of reciprocity, and in 1889 Mr. Laurier moved an amendment to supply on February 26, declaring that steps should be taken by the Government to secure unrestricted freedom in the trade relations of the two countries. At the same time Mr. Goldwin Smith advocated very strongly the fullest measure of reciprocity, and indeed a Customs Union with the United States. This position was accepted in a speech by Sir Richard Cartwright, who had been Minister of Finance in the Mackenzie Government from 1873 to 1878, and was Minister of Trade and Commerce in Sir Wilfrid Laurier's Government from 1896, on October 12, 1887, in which he declared in favour of commercial union even in view of the political risk of annexation. 'There is,' he said, 'a risk, and I cannot overlook it. But it is a choice of risks, and our present position is anything but one of stable equilibrium. Without Manitoba and the Maritime Provinces we cannot maintain ourselves as a Dominion. And looking to their present tempers and condition, and more especially to the financial results of confederation in the Maritime Provinces, I say deliberately that the refusal or failure to secure free trade with the United States is much more likely to bring about just such a political crisis as these parties affect to dread than even the very closest commercial connexion that can be conceived.'

Mr. Laurier's attitude was more cautious, but though he was not prepared to accept commercial union he declared that his policy was to abandon the policy of retaliation 'to show the American people that we are brothers, and to hold out our hands to them with a due regard for the duties we owe to our Mother Country'. In 1888 a caucus of Liberal Members of Parliament authorized Sir Richard Cartwright to introduce into the House of Commons a resolution in favour of reciprocity with the United States which implied discrimination against the Mother Country. The Resolution which Sir Richard Cartwright introduced on March 14, 1888, read as follows :—

That it is highly desirable that the largest possible freedom of commercial intercourse should obtain between the Dominion of Canada and the United States, and that it is expedient that all articles manufactured in or the natural products of either of the said countries should be admitted free of duty into the ports of the other, articles subject to duties of excise or of internal revenue alone excepted ; that it is further expedient that the Government of the Dominion should take steps at an early date to ascertain on what terms and conditions arrangements can be effected with the United States for the purpose of securing full and unrestricted reciprocity of trade therewith.

In 1891 Sir John Macdonald himself reminded Canada that whatever measure of reciprocal trade had been obtained from the United States had been obtained by the Conservatives, and he stated that he believed that there was 'room for extending our trade on a fair basis, and that there were things on which we could enlarge our views without in any way infringing on the National Policy'.

Simultaneously with the announcement of the dissolution of Parliament, the Government published steps which they had taken to secure reciprocity with the United States, and they offered a renewal of the Reciprocity Treaty of 1854, with modifications required by the altered circumstances of both countries. The fact that the negotiations had been commenced was used as a strong argument against the claims of the Opposition to be given office. At any rate, partly by this

concession to the demand of reciprocity, and partly by appeals, on the other hand, to British sentiment against annexation, aided by an unexpected declaration by Mr. Blake, one of the Liberal leaders, that he deprecated a policy tending to annexation,[1] the Conservatives won the election, though not by a large majority, and in 1892 they took steps to carry out further negotiations for reciprocity. But the proposal broke down at the very outset, for Mr. Blaine, the United States Secretary of State, demanded discriminatory duties against British and foreign goods, and required that a uniform tariff should be adopted by the two countries, or so at least it was thought that he demanded, but in any case it is clear that reciprocity in manufactured goods was asked for by the United States.

The National Liberal Convention which met at Ottawa in June 1893 pronounced as follows on the position :—

That having regard to the prosperity of Canada and the United States as adjoining countries, with many mutual interests, it is desirable that there should be the most friendly relations, and broad and liberal trade intercourse between them ; that the interests alike of the Dominion and of the Empire would be materially advanced by the establishing of such relations ; that the period of the old reciprocity treaty was one of marked prosperity to the British North American Colonies ; that the pretext under which the Government appealed to the country in 1891 respecting negotiation for a treaty with the United States was misleading and dishonest and intended to deceive the electorate ; that no sincere effort has been made by them to obtain a treaty, but that on the contrary it is manifest that the present Government, controlled as they are by monopolies and combines, are not desirous of securing such a treaty ; that the first step towards obtaining the end in view is to place a party in power who are sincerely desirous of promoting a treaty on terms honourable to both countries ; that a fair and liberal reciprocity treaty would develop the great natural resources of Canada, would enormously increase the trade and commerce between the two countries, would tend to encourage friendly relations

[1] Goldwin Smith to the last believed in a peaceful union of Canada and the United States ; see *Canadian Annual Review*, 1909, p. 626 ; 1910, p. 181 ; and his *Reminiscences*.

between the two peoples, would remove many causes which have in the past provoked irritation and trouble to the Governments of both countries, and would promote those kindly relations between the Empire and the Republic which afford the best guarantee for peace and prosperity ; that the Liberal party is prepared to enter into negotiations with a view to obtaining such a treaty, including a well-considered list of manufactured articles, and we are satisfied that any treaty so arranged will receive the assent of Her Majesty's Government, without whose approval no treaty can be made.

In 1896 the Liberal Government came into office, and it was naturally anxious to carry out the policy which it had adopted when in Opposition. Arising out of the question of the Seal Fisheries, arrangements were made for a Joint High Commission to consider all the outstanding questions between the United States and Canada. On that High Commission Sir Wilfrid Laurier, Sir Richard Cartwright, and Sir Louis Davies represented Canada, and Lord Herschell Great Britain. The Commissioners made an effort to secure for Canada reciprocity in trade relations.[1] The United States were very anxious to obtain a large schedule of manufactured articles, and progress was slow and difficult, but before the Commission rose it was understood that a schedule had been arranged which provided practically for free trade in the products of the mines, for a considerable schedule of agricultural products, and for a careful and judicial readjustment of the duties on certain manufactures. It need hardly be said that in carrying on these negotiations the Canadian representatives had the full assent and support of the Imperial Government. But the negotiations did not result in a treaty owing to difficulties with regard to the Alaska boundary.

These negotiations were subsequent in date to the passing of a preferential tariff in 1897, and they show clearly how

[1] Cf. Willison, op. cit., ii. 190. It is a striking instance of the change in political outlook in Great Britain since 1903, that the action of Mr. Bryce in 1911 in assisting the reciprocity negotiations was censured freely in the Imperial Parliament, whereas all approved Lord Herschell's mission in 1898–9 at the bidding of a Conservative Government. But clearly the Ambassador was not the person to interfere with the proposals of the Government.

little the Canadian Government saw any inconsistency between the preferential tariff and reciprocity with the United States. This position is shown in speech after speech by responsible Canadian ministers ever since. It may suffice one to quote some remarks made on December 11, 1903, by Sir Richard Cartwright in reviewing the fiscal situation in a speech made at Toronto.[1]

I may be pardoned for saying what my own position is. I have held it long; I have advocated the formation of a friendly alliance by any possible means between Great Britain, Canada, and the United States. With that view I advocated reciprocity with the United States. Largely with that view I have advocated the British Preference. It is for that reason I would welcome an English Zollverein in that direction, and if Britain and Canada desire to bring about that realization, then I would heartily bid them God-speed.

In the same year, on January 15, at a banquet, Sir Frederick Borden, Minister of Militia in the Laurier Government, spoke as follows :—[2]

We have heard, all of us, a great deal about the question of reciprocity. Some of us, perhaps, in times past thought that the United States were unfriendly, were disposed at any rate not to be as friendly towards us on questions of trade as they might be. I am bound to say that at one time I took that view myself, but even if I held that view to-day, I would feel that the account was pretty nearly squared; because as a result of their refusal to trade with us, they have made us self-reliant, and have made us the greatest rival they have in the one free market of the world. It would be a most desirable thing that trade between these two countries should flow as freely as possible. And when the time comes, and the United States are prepared to trade with us, I would hold both hands for a fair and honourable arrangement for the exchange of commodities between these two countries.

In introducing his proposals on January 26, 1911, in the

[1] *Canadian Annual Review*, 1903, p. 383.

[2] Ibid., p. 379. Accounts of the movement will be found in each of the issues of this valuable *Review* for 1904–10. See especially, 1909, pp. 622–4; 1910, pp. 267 seq., 330 seq., 621 seq.

Canadian House of Commons, Mr. Fielding spoke as follows with regard to the attitude of his Government and the history of the question :—

Now, we turn to the change of administration in 1896. I have already said that in the Liberal platform of 1893 reciprocity occupied a prominent part, and soon after this Government came into power—indeed, if my memory is correct, even before Parliament assembled—two members of the Government were sent to Washington with the view of ascertaining what might be done in the way of reciprocal treaty arrangements. They did not find the situation favourable, and they came back to their colleagues and reported that they were not able to accomplish anything. There is one incident in this history that I have forgotten that is of importance, and that is that in the year 1891 the dissolution[1] of Parliament was ordered by the Conservative Government of the day upon the ground that they regarded the reciprocity question as so important that they required a mandate from the people of the Dominion to enable them to proceed to Washington and deal with that question. The Liberal party of the day also was in favour of reciprocity. Both parties declared for reciprocity at that time, and the only question was as to which one could get the largest degree of reciprocity. So, if we follow it from day to day and from year to year, taking the history of the reciprocity treaty of 1854, the early years of confederation, the period in connexion with the National Policy, and the period since the change in administration down to the Joint High Commission of 1898–9, we find that throughout all these years, whatever difference there may have been amongst the public men of our country on other subjects, there was no difference of opinion as to the great importance and desirability of re-establishing reciprocal trade relations with the United States of America. . . .

We present the arrangement to you to-day, Sir, not as a triumph of one country over the other, but as the result of an effort to do justice to both ; we commend this arrangement, Sir, to the judgement of this Parliament as the President of the United States will commend it to the judgement of the Congress. The one fear I have is that there may be people who will say that we have made so good a bargain that the Congress should not approve of it. In times

[1] Bitterly resented by Goldwin Smith as a breach of duty and as a proof of the impotence of the Governor-General in accepting such advice.

past friendly arrangements have been made with the United States Government which have failed to receive the approval of the Congress, but we think the time is more favourable now. We think we have found the psychological moment for dealing with this question ; we think we are within reach of some of the commercial advantages for which our people have struggled now for half a century. We commit this matter to the care of the Canadian Parliament with the firm conviction that it is going to be a good thing for Canada, a good thing for the United States, and that we will continue to have it and maintain it not because there is any binding obligation to do so, but because the intelligence of the people of the two countries will decide that it is a good thing for the promotion of friendly relations and for the development of commerce of the two countries.

His attitude to the whole question is admirably summed up in his telegram to the High Commissioner for Canada of February 7, 1911, which reads as follows :—[1]

Reciprocal trade relations with the United States have been the policy of all parties in Canada for generations—many efforts have been made to secure a treaty, but without success. Sir John Macdonald's National Policy Tariff, 1879, contains a standing offer of reciprocity with the States covering a large portion of the products included in the present arrangement. The unwillingness of the Americans to make any reasonable arrangement led to much disappointment in Canada. Sir Wilfrid Laurier several years ago gave expression to this, and said Canada would not again take the initiative in negotiations. Now that the Americans have entirely changed their attitude and have approached Canada with fair offers, our Government take the position that we should meet them fairly, and that in making such an arrangement as is now proposed we are realizing the desires of our people for half a century ; and also that in promoting friendly relations with the neighbouring republic we are doing the best possible service to the Empire. Canada is seeking markets everywhere for her surplus products—subsidizing steamship lines and sending out commercial agents. Would it not be

[1] See *Parl. Pap.*, Cd. 5512. The Canadian debates of January 26, February 9, 14, March 7, 8, contain very important speeches, especially important in their bearing on British preference and loyalty to the British connexion, and in their recognition of provincial rights by Mr. Paterson (p. 3389). Cf. *Ottawa Free Press*, September 21, 1911.

ridiculous in the pursuit of such a policy to refuse to avail herself of the markets of the great nation lying alongside? The expressed fear that it will seriously affect imports from Great Britain is groundless; the greater part of the agreement deals with natural products which Great Britain does not send us. The range of manufactures affected is comparatively small, and in most cases the reductions are small. It appears to be assumed in some quarters that the tariff rates agreed upon discriminate in favour of the United States and against Great Britain. There is no foundation for this. In every case Great Britain will still have the same rate, or a lower one. Canada's right to deal with the British preference as she pleases remains untouched by the agreement. The adoption of the agreement will probably lead to some further revision of the Canadian Tariff in which the Canadian Parliament will be entirely free to fix the British Preferential Tariff at any rates that may be deemed proper.

In view of the conclusion of the reciprocity arrangement the Canadian Government decided[1] at the Imperial Conference to press for the exemption of Canada from the operation of the old treaties with Argentina, Austria-Hungary, Bolivia, Colombia, Denmark, Norway, Russia, Spain, Sweden, Switzerland, and Venezuela, which contain most-favoured-nation clauses, and are binding on Canada. It may at once be admitted that the presence of these clauses is vexatious and annoying, but the denunciation is a serious matter unless it can be arranged for without involving the denunciation of the treaties generally. The proposal goes far beyond the denunciation of the Belgian and German treaties, for these treaties forbad a preference to Great Britain by the Colonies, and were an accidental and unreasoning restriction on the internal freedom of the Empire, which might properly be removed from the Empire as a whole by the denunciation of the treaties. To denounce these older treaties merely to free Canada would be a very different step.

In these negotiations the Canadian ministers were to all intents and purposes neither less not more than plenipoten-

[1] See *Parl. Pap.*, Cd. 5745, pp. 333–9; below, Part VIII, chap. iii.

tiaries, and they avoided the necessity of any formal treaty by arranging for concurrent legislation. But they had already negotiated with representatives of America at Ottawa, and it is significant that in the Canadian House of Commons, challenged on a question of the precedence of consuls, Sir W. Laurier[1] expressed the view that though the position of consuls was anomalous it was nevertheless semi-diplomatic, and that it would be desirable that precedence should be accorded to them, but he did not raise this issue at the Conference.

It is clear, indeed, that the recent negotiations have raised in a new form the old view which was held by the Liberal party in Canada, that the Dominion Government should have the treaty power. Mr. Blake spoke in favour of this view on October 3, 1874,[2] and in 1882, and Sir W. Laurier re-echoed the matter in his speech on the Alaskan debate on October 23, 1903.[3] With this view may be compared that of the Royal Commission appointed by the Governor of Victoria to consider federal union, which recommended that the

[1] See *Debates*, 1910–1, pp. 973 seq. See also his answer in the House of Commons on December 2, 1909, pp. 853–5; *Canadian Annual Review*, 1909, p. 162. On the other hand, on December 15, 1909 (ibid., 1582–5), he emphatically declined to adopt the proposal of a Canadian attaché to the Embassy at Washington on the ground that Mr. Bryce's services were quite adequate, and in January 1911 he publicly eulogized the services of the Ambassador in negotiating treaties for Canada. The praise was deserved: Mr. Bryce's term of office saw not merely the Fisheries Arbitration Treaty of 1909, but also a Pecuniary Claims Treaty (1911), a Pelagic Sealing Treaty (1911), Arbitration Treaties (1908 and 1911), and treaties for the Passamaquoddy boundary (1910), the regulation of boundary waters, including a general provision for an arbitration tribunal for Canadian questions (1909), which may solve informally many difficulties as to diplomatic intercourse, transit of prisoners, wrecking privileges, &c.

[2] See Willison, *Sir Wilfrid Laurier*, i. 206 seq. Cf. Goldwin Smith, *Canada*, p. 187; *House of Commons Debates*, 1882, p. 1075; 1887, p. 376; 1889, pp. 171–94 (Cartwright); 1892, p. 1123 (Mills).

[3] See *Canadian Annual Review*, 1903, pp. 328–330, where Mr. Borden's and Sir C. Tupper's views were both given. Cf. also Sir W. Laurier in *Debates*, 1907–8, p. 1260; 1909, p. 1980 (on External Affairs Department, Act 8 & 9 Edw. VII. c. 13). But see Mr. Asquith's reply in House of Commons, March 3, 1909 (i. 1421, 1422).

Australian Colonies should be accorded the treaty power and given the status of neutral powers under the same Crown as the United Kingdom. The substance of their recommendations[1] was as follows :—

VICTORIA

III. *Neutrality of the Colonies in War*

13. It has been proposed to establish a Council of the Empire, whose advice must be taken before war was declared. But this measure is so foreign to the genius and traditions of the British Constitution, and presupposes so large an abandonment of its functions by the House of Commons, that we dismiss it from consideration. There remains, however, we think, more than one method by which the anomaly of the present system may be cured. . . .

19. The Colony of Victoria, for example, possesses a separate Parliament, Government, and distinguishing flag ; a separate naval and military establishment. All the public appointments are made by the Local Government. The only officer commissioned from England who exercises authority within its limits is the Queen's Representative ; and in the Ionian Islands, while they were admittedly a Sovereign State, the Queen's Representative was appointed in the same manner. The single function of a Sovereign State, as understood in International Law, which the Colony does not exercise or possess, is the power of contracting obligations with other states. The want of this power alone distinguishes her position from that of states undoubtedly sovereign.

20. If the Queen were authorized by the Imperial Parliament to concede to the greater Colonies the right to make treaties, it is contended that they would fulfil the conditions constituting a Sovereign State in as full and perfect a sense as any of the smaller states cited by public jurists to illustrate this rule of limited responsibility. And the notable concession to the interest of peace and humanity made in our own day by the Great Powers with respect to privateers and to merchant shipping renders it probable that they would not, on any inadequate grounds, refuse to recognize such states as falling under the rule.

[1] *Parl. Pap.*, 1870, Sess. 2, ii. 247; cf. *contra* Higinbotham, *Debates*, x. 690 seq. Messrs. Kerferd, G. Berry, and Gavan Duffy all signed this part of the report.

21. It must not be forgotten that this is a subject in which the interests of the Colonies and of the Mother Country are identical. British statesmen have long aimed not only to limit more and more the expenditure incurred for the defence of distant Colonies, but to withdraw more and more from all ostensible responsibility for their defence; and they would probably see any honourable method of adjusting the present anomalous relations with no less satisfaction than we should.

22. Nor would the recognition of the neutrality of the self-governed Colonies deprive them of the power of aiding the Mother Country in any just and necessary war. On the contrary, it would enable them to aid her with more dignity and effect, as a Sovereign State could, of its own free will, and at whatever period it thought proper, elect to become a party to the war.

23. We are of opinion that this subject ought to be brought under the notice of the Imperial Government. If the proposal should receive their sanction, they can ascertain the wishes of the American and African Colonies with respect to it, and finally take the necessary measures to obtain its recognition as part of the public law of the civilized world.

Comment at the time was generally unfavourable; the leading papers, such as the *Argus* and the *Daily Telegraph*, condemned the idea as impracticable, and the matter went no further, for no other Colony moved in it. In the Naval Bill debates of 1910 Sir Wilfrid Laurier was accused by the Opposition of denying the doctrine that war with Great Britain meant war with the Colonies, but the accusation was wholly unjust and unfounded. He only asserted that in any war it was for Canada to decide how far she would actively assist Great Britain; Canada, of course, would resist any attack on herself with all her strength.[1] The doctrine is quite logical and fair so long as the Dominions

[1] Cf. *House of Commons Debates*, 1909–10, pp. 1732 seq., 2952 seq., 4139 seq., 4316 seq., 4413 seq., 7528 seq.; 1910–1, pp. 57 seq.; his speech at Montreal, October 10; Montreal *Herald*, October 11, 1910. See also Ewart, *Kingdom of Canada*, pp. 59, 364; *The Kingdom Papers*, pp. 7, 8, 48–52; *Parl. Pap.*, Cd. 5745, p. 117; below, Part VIII, chap. iii. Here may be mentioned the precarious position of the arrangement of 1817 for the limitation of armaments on the great lakes, which has not been at all carefully observed of late by the United States, in the view of Canada; see *Canadian Annual Review*, 1909, p. 626; 1910, p. 618; *The Round Table*, i. 317–9.

have no voice in determining Imperial policy, and Australia clearly holds the same view, for just as much as Canada she has insisted on the fact that she should maintain supreme control over her fleet, leaving her free to place it at the disposal of the Imperial Government or not as she may deem desirable,[1] and the idea of forces maintained by the Colonies at Imperial expense for Imperial purposes, proposed by Mr. Seddon at the Imperial Conference of 1902, was not accepted by any Dominion, nor ultimately adopted even by New Zealand.

[1] See *Parl. Pap.*, Cd. 4288; *Parliamentary Debates*, 1910, pp. 4728 seq.; *Parl. Pap.*, Cd. 5746-2; *British Australasian*, September 21, 1911. Mr. Fisher at the Conference of 1911 was prepared to accept consultation by the Imperial Government on all topics, while Sir W. Laurier insisted that consultation must be left to the discretion of the Imperial Government, as a right to be consulted involved responsibility for war, but his view is really that of Sir W. Laurier; *Standard of Empire*, September 2, 1911, p. 8.

But the Canadian elections of September 21, 1911, show the strength of British sentiment despite the attractions of material gains; the reciprocity agreement was in effect rejected by a majority much larger than that (41) possessed by Sir W. Laurier when the obstruction of the Opposition compelled him to appeal to the country, eight ministers, including Mr. Fielding and Mr. Paterson, the negotiators of the agreement, losing their seats. No doubt the incautious references of American politicians to possible political results counted for much. On the naval question the attitude of the Conservative leader has been mainly to emphasize the need of close co-operation with the British fleet. On the other hand, the Nationalist party in Quebec condemned Sir W. Laurier for his excessive imperialism and for dragging Canada into British wars.

The idea of neutrality was revived, through a misunderstanding of Sir W. Laurier's attitude at the Conference, by the *Volksstem* in South Africa; it has been effectively repudiated by General Botha (see *Times*, July 28; *Morning Post*, August 3, 8, 16; *The State*, vi. 131 seq.; *The Round Table*, i. No. 4).

CHAPTER VI

TRADE RELATIONS AND CURRENCY

§ 1. Trade Relations

There can be no clearer proof of the autonomy of the Colonies than their fiscal arrangements. When self-government was accorded to Canada, though there was no idea and had been no idea since 1778 of taxing the Colony without spending all the proceeds therein, it was bound by a tariff exacted from it by the Imperial Parliament and raised under laws enacted by the same authority.[1] In 1846[2] an Imperial Act allowed the British Colonies in Canada to reduce or repeal by their own legislation duties imposed by Imperial Acts upon foreign goods imported from foreign countries into the Colonies in question. Canada soon availed herself of the privilege, while in 1849[3] a further Imperial Act added to the control of duties the control of the Colonial post office, allowing Canada full power to dispose as she would of her postal arrangements, a matter of great commercial importance in a growing Colony where communications were difficult, and where Imperial legislation was obviously utterly out of place. In 1849[4] the remains of the navigation laws went, and the St. Lawrence was thrown open to the vessels of all nations. The Legislature had addressed the Imperial Government on the subject, and had urged that it was impossible to maintain the system of protection in the Colonies for British shipping when Great Britain had aban-

[1] Colonial legislation could also impose duties, and there was confusion and conflict; see 5 & 6 Vict. c. 49. Imperial customs officers disappeared largely in 1850, and practically wholly by 1855. Cf. *Parl. Pap.*, February 4, 1851, p. 42; July 1, 1852, p. 97; Hannay, *New Brunswick*, i. 410 seq.; ii. 23, 172; Grey, *Colonial Policy*, ii. 370, 379.

[2] 9 & 10 Vict. c. 94. Cf. Adderley, *Colonial Policy*, p. 28; 8 & 9 Vict. c. 93.

[3] 12 & 13 Vict. c. 66. Hitherto it had been an Imperial monopoly.

[4] 12 & 13 Vict. c. 29. The control of customs law was given by 20 & 21 Vict. c. 62, and see now 36 & 37 Vict. c. 36, ss. 149–51.

doned the protection against foreign competition hitherto imposed for Colonial imports. As a matter of fact, the adoption of free trade had caused great dislocation of trade and commerce in Canada, which was not removed until the repeal of the navigation laws threw open the St. Lawrence to the flags of the world. The Australian Colonies on their birth were given power to raise customs duties,[1] subject, however, to the proviso that they should not be contrary to treaty, or differential, or imposed on goods for the use of the Imperial forces in the Colony, which was a natural rule, as the Imperial Government had to defray the cost of the garrisons, and could hardly be expected to pay duties on the goods which they imported to feed and clothe the troops. In the case of the four South African Colonies no limitations were imposed on their powers with regard to customs duties when self-government was accorded, nor was New Zealand fettered in 1852,[2] except by the provision that duties must not be contrary to treaty, or be levied on goods for the troops or naval forces. Newfoundland received the benefit of the Act regarding Canadian provinces of 1846.

A further development of the doctrine was seen when the Colonies began to abandon the Crown Colony policy of levying duties solely for revenue purposes and to pass a protective tariff. In 1859 the Governor of Canada sent home a dispatch forwarding an Act imposing very heavy duties ; the Secretary of State replied asking him to bring before his ministers a protest from the Chamber of Commerce at Sheffield calling attention to the damage which would result from such duties to trade in the United Kingdom.[3] He called attention to the fact that such heavy duties were practically in favour of the trade of the United States, in view of the large facilities for smuggling granted by the long frontier between Canada and the States. He added that when an authenticated copy

[1] 13 & 14 Vict. c. 59, ss. 27 and 31. The requirement of reservation by 5 & 6 Vict. c. 76, s. 31, was repealed by 29 & 30 Vict. c. 74, for which cf. Blackmore, *Constitution of South Australia*, pp. 69, 70.

[2] 15 & 16 Vict. c. 72, s. 61.

[3] *Parl. Pap.*, H. C. 400, 1864, pp. 7 seq.

of the Act arrived he would probably feel bound to assent to it, but he considered it his duty no less to the Colony than to the Mother Country to express his regret 'that the experience of England, which has fully proved the injurious effect of the protective system and the advantage of low duties upon manufactures both as regards trade and revenue, should be lost sight of, and that such an Act as the present should have passed. I much fear the effect of the law will be that the greater part of the new duty will be paid to the Canadian producer by the Colonial consumer, whose interests, as it seems to me, have not been sufficiently considered on this occasion.' In a later dispatch of November 5, 1859, the Secretary of State forwarded a letter from the Privy Council for Trade in which it was said :—

They think, however, that in leaving the Act to its operation, Her Majesty's Government should express their regret that the fiscal requirements of Canada should have compelled it to resort to a measure so objectionable in principle, and their apprehension of the injurious effect which it is calculated to produce upon the industrial progress of the province.

On November 11, 1859, the Governor sent back a reply from the Canadian Government prepared by Mr. (afterwards Sir) A. Galt, in which the following vindication was given of the principles which should regulate the relations in these matters of the Home and the Colonial Governments :— [1]

The Minister of Finance has the honour respectfully to submit certain remarks and statements upon the Dispatch of His Grace the Duke of Newcastle, dated August 13, and upon the Memorial of the Chamber of Commerce of Sheffield, dated August 1, transmitted therewith.

[1] *Parl. Pap.*, H. C. 400, 1864, pp. 11, 12. It may be noted that earlier attempts had been made to forbid the granting of bounties; the Lieutenant-Governor of New Brunswick was instructed in 1849 to veto any such measures, as the result of the grant of a bounty for the cultivation of hemp; Earl Grey, *Colonial Policy*, i. 279. A circular dispatch of June 24, 1843, forbade differential duties (see Hannay, *New Brunswick*, ii. 122); and differential duties were included as a ground of reservation in the royal instructions to all Governors, and the injunction of reservation is repeated in Lord Ripon's dispatch of 1895, which is still binding on all Dominions; see *Parl. Pap.*, C. 7824, p. 9; below, p. 1181, n. 4.

It is to be deeply regretted that his Grace should have given to so great a degree the weight of his sanction to the statements in the Memorial, without having previously afforded to the Government of Canada the opportunity of explaining the fiscal policy of the province and the grounds upon which it rests. The representations upon which his Grace appears to have formed his opinions are those of a provincial town in England, professedly actuated by selfish motives ; and it may fairly be claimed for Canada, that the deliberate acts of its Legislature, representing nearly three millions of people, should not have been condemned by the Imperial Government on such authority, until the fullest opportunity of explanation had been afforded. It is believed that nothing in the Legislation of Canada warrants the expressions of disapproval which are contained in the dispatch of his Grace, but that on the contrary due regard has been had to the welfare and prosperity of Her Majesty's Canadian subjects.

From expressions used by his Grace in reference to the sanction of the Provincial Customs Act, it would appear that he had even entertained the suggestion of its disallowance ; and though, happily, Her Majesty has not been so advised, yet the question having been thus raised, and the consequences of such a step, if ever adopted, being of the most serious character, it becomes the duty of the Provincial Government distinctly to state what they consider to be the position and rights of the Canadian Legislature.

Respect to the Imperial Government must always dictate the desire to satisfy them that the policy of this country is neither hastily nor unwisely formed ; and that due regard is had to the interests of the Mother Country as well as of the Province. But the Government of Canada acting for its Legislature and people cannot, through those feelings of deference which they owe to the Imperial authorities, in any manner waive or diminish the right of the people of Canada to decide for themselves both as to the mode and extent to which taxation shall be imposed. The Provincial Ministry are at all times ready to afford explanations in regard to the acts of the Legislature to which they are party ; but subject to their duty and allegiance to Her Majesty, their responsibility in all general questions of policy must be to the Provincial Parliament, by whose confidence they administer the affairs of the country ; and in the imposition of taxation it is so plainly necessary that the Administration and the people should be in accord, that the former cannot admit

responsibility or require approval beyond that of the local Legislature. Self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada. It is, therefore, the duty of the present Government distinctly to affirm the right of the Canadian Legislature to adjust the taxation of the people in the way they deem best, even if it should unfortunately happen to meet the disapproval of the Imperial Ministry. Her Majesty cannot be advised to disallow such acts, unless her advisers are prepared to assume the administration of the affairs of the Colony irrespective of the views of its inhabitants.

The Imperial Government are not responsible for the debts and engagements of Canada. They do not maintain its judicial, educational, or civil service; they contribute nothing to the internal government of the country, and the Provincial Legislature, acting through a Ministry directly responsible to it, has to make provision for all these wants; they must necessarily claim and exercise the widest latitude as to the nature and extent of the burthens to be placed upon the industry of the people. The Provincial Government believes that his Grace must share their own convictions on this important subject; but as serious evil would have resulted had his Grace taken a different course, it is wiser to prevent future complication by distinctly stating the position that must be maintained by every Canadian Administration.

These remarks are offered on the general principle of Colonial taxation. It is, however, confidently believed, that had his Grace been fully aware of the facts connected with the recent Canada Customs Act, his dispatch would not have been written in its present terms of disapproval.

The Canadian Government are not disposed to assume the obligation of defending their policy against such assailants as the Sheffield Chamber of Commerce; but as his Grace appears to have accepted these statements as correct, it may be well to show how little the memorialists really understood of the subject they have ventured to pronounce upon so emphatically.

The object of the Memorial is 'to represent the injury anticipated to the trade of this town (Sheffield) from the recent advance of the import duties of Canada'. To this it is sufficient reply to state that no advance whatever was made on Sheffield goods by the Customs Act in question; the duty was 20 per cent. on these articles enumerated in the

former tariff, and the only difference is, that they are now classed as unenumerated, paying the same duty. But on the other hand, by the present tariff, the raw material, iron, steel, &c., used in the manufacture of such goods, has been raised from 5 per cent. to 10 per cent. ; consequently under the Act of which the Memorialists complain, their position in competing with the Canadian manufacturer is actually better than under the previous tariff. The establishment of this fact entirely destroys the force of the whole argument in the Memorial, as regards the trade they especially represent.

The Chamber of Commerce, in their anxiety to serve the interests of their own trade, have taken up two positions from which to assail the Canadian tariff, which are, it is conceived, somewhat contradictory. They state that it is intended to foster native manufactures, and also that it will benefit United States manufacturers. It might be sufficient to say that the tariff cannot possibly effect both these objects, as they are plainly antagonistic ; but it may be well to put the Chamber of Commerce right on some points connected with the competition they encounter from the American manufacturers. There are certain descriptions of hardware and cutlery which are manufactured in a superior manner by the American and Canadian manufacturers, and these will not, under any circumstances, be imported from Sheffield. In these goods there is really no competition ; their relative merits are perfectly well known, and the question of duty or price does not decide where they shall be bought. In regard to other goods in which Sheffield has to compete with the United States, it can be easily shown that no advantage can by possibility be enjoyed by the foreigner in the Canadian market, because Sheffield is able now to export very largely of these very goods to the American market, paying a duty of 24 per cent., and competing with the American maker. Certainly, then, in the Canada market Sheffield, paying only 20 per cent. duty, can have nothing to fear from American competition, which is subject also to the same duty, and even if admitted absolutely free, would yet be somewhat less able to compete than in the United States. The fact is, that certain goods are bought in the Sheffield market, and certain in the American. We have in Canada tradesmen who make goods similar to the American, but not to the Sheffield ; and if our duty operates as an encouragement to manufacturers, it is rather against the American than the English manufacturer, as any one acquainted with this country well knows.

The Chamber of Commerce is evidently quite ignorant of the principle upon which the valuation of goods for duty is made by Canada, which is on the value in the market where bought. The Sheffield goods are therefore admitted for duty at their price in Sheffield, while the American goods are taken at their value in the United States. This mode of valuation is clearly in favour of the British manufacturer, and is adopted with the deliberate intention of encouraging the direct trade, as will be shown hereafter.

The reply of the Board of Trade indicated the danger that industries which grew up under protection would always require protection, and the danger has, of course, been shown to be a real one, though Mr. Galt was not then able to agree with the forecast, and though high protection was introduced only in 1879, after the return of the Macdonald Ministry in 1878. But apart from that consideration, which was clearly one for Canada to decide upon, the rights of the case were distinctly with the Colonial Government, and that was the last attempt of the Imperial Government to address remonstrances in such a tone to the Canadian or other Colonial Government, though they were unjustly suspected of having sympathized with the Upper House of Victoria in the dispute of 1865–6, regarding the tacking of the new tariff for protection to the Appropriation Bill.

In 1870 a strong desire manifested itself for the adoption of inter-colonial free trade between the Australian Colonies and the Colony of New Zealand, but the difficulty was that the Australian Colonies were prevented by their constitutions from granting preferential duties, and all Bills in them and in New Zealand had to be reserved. Bills passed by Tasmania and New Zealand in 1870 for reciprocity, and one passed in South Australia in 1871, were not given the royal assent.[1] For a time feeling ran high in the Colonies, and efforts were made to secure a concession from the Imperial Government of further powers. In January 1868,[2] the Imperial Govern-

[1] *Parl. Pap.*, H. C. 196, 1894, pp. 9–11. Cf. C. 7824, p. 9.

[2] *Parl. Pap.*, C. 576, p. 1. In 1849–50 a tariff union for Australia was proposed by Earl Grey, and in a dispatch of October 31, 1851, he advocated free trade ; see *Parl. Pap.*, July 1, 1852, p. 67 ; *Hansard*, ser. 3, ccxv. 2000–2.

ment had intimated that they would be prepared to consider favourably a general customs union for the whole of Australia with an equitable division of the proceeds of importation, but when the matter was discussed in a conference at Melbourne in June 1870, it was found impossible to agree to any such union, as New South Wales desired it to be on a free-trade basis, and Victoria wanted it to be on a protection basis. The conference, however, with the views of which New Zealand and Queensland were in harmony, though not present at the conference, were in favour of the right to establish preferential duties *inter se*, while they definitely repudiated any claim to be allowed to make treaties, and asked only such privileges as have been given in the case of the Canadian Provinces before federation, and as was accorded in the Acts of 1867 regarding the transit of goods across the Murray between New South Wales and Victoria. In the papers sent home by the Governor of Tasmania on July 14, 1870, was a long minute by the Attorney-General of New Zealand,[1] who argued that there could be no insuperable objection to an arrangement which had existed in the case of Canada before federation under laws of 1859 and of 1866 of Canada, and c. 8 of the *Revised Statutes* of Nova Scotia, and he pointed out that there was no treaty known to him which bound countries to receive national treatment if one Colony made concessions to another Colony, though the Belgian treaty of 1862 forbade the Colonies to give preference to the Mother Country. On October 27[2] the Governor forwarded a copy of the inter-colonial free-trade Bill (No. 43), which was admittedly *ultra vires*, but which it was desired should be rendered legal by Imperial legislation. On October 8[3] the Governor of South Australia sent home a petition on the question from the Parliament asking for the repeal of the provision against differential duties, and the Parliament of New Zealand passed a Bill (No. 99) for the purpose of authorizing reciprocity with the Australian Colonies.[4]

[1] *Parl. Pap.*, C. 576, pp. 39, 40.
[2] Ibid., pp. 43 seq.
[3] Ibid., p. 52.
[4] Ibid., p. 55.

The whole position was summed up by the Secretary of State in a dispatch of July 13, 1871,[1] as follows :—

I have had for some time under my consideration dispatches from the Governors of several of the Australasian Colonies, intimating the desire of the Colonial Governments that any two or more of those Colonies should be permitted to conclude agreements securing to each other reciprocal tariff advantages, and reserved Bills to this effect have already reached me from New Zealand and Tasmania.

It appears that, whilst it is at present impossible to form a General Customs Union, owing to the conflicting views of the different Colonial Governments as to Customs duties, the opinion extensively prevails which was expressed at the Inter-colonial Conference held at Melbourne last year, in favour of such a relaxation of the law as would allow each Colony of the Australasian group to admit any of the products or manufactures of the other Australasian Colonies duty free, or on more favourable terms than similar products and manufactures of other countries.

At the same time it has not been stated to me from any quarter that the subject urgently presses for the immediate decision or action of Her Majesty's Government, and I trust, therefore, that any delay that may arise in dealing with it will be attributed to its true cause, namely, to the desire of Her Majesty's Government to consider the subject deliberately in all its bearings, with a view to arrive at such a settlement as may not merely meet temporary objects, but constitute a permanent system resting upon sound principles of commercial policy.

The necessary consultations with the Board of Trade and with the Law Officers have unavoidably been protracted to a late period of the session, and if Her Majesty's Government were satisfied that they could properly consent to the removal of the restriction against differential duties, it would not be possible now to obtain for so important a measure the attention which it should receive from Parliament. It is by no means improbable that the introduction of a Bill to enable the Australasian Colonies to impose differential duties might raise serious discussions and opposition both in Parliament and in the country, on the ground that such a measure would be inconsistent with the principles of Free Trade and prejudicial to the commercial and political relations between the different parts of the Empire. And I feel confident that

[1] *Parl. Pap.*, C. 576, pp. 2 seq.

the Colonial Governments will not regret to have an opportunity afforded them of further friendly discussion of the whole subject after learning the views of Her Majesty's Government upon it, before any final conclusion is arrived at. I will therefore proceed to notice points which seem to Her Majesty's Government to require particular examination.

The Government of New Zealand appears, from the Bill laid before the House of Representatives and from the financial statement of the Treasurer, to have originally contemplated the granting of special bonuses to goods imported into New Zealand from the other Australasian Colonies. As, however, this expedient was not eventually adopted, I am relieved from the necessity of discussing the objections to such a mode of avoiding the rule against differential duties.

The proposal now before me raises the following questions, namely ;

1. Whether a precedent exists in the case of the British North American Colonies for the relaxation of the rule or law now in force ?

2. Whether Her Majesty's Treaty obligations with any Foreign Power interfere with such relaxation ?

3. Whether a general power should be given to the Australasian Governments to make reciprocal tariff arrangements, imposing differential duties, without the consent of the Imperial Government in each particular case ?

4. Whether, on grounds of general Imperial policy, the proposal can properly be adopted ?

The Attorney-General of New Zealand, in his Report accompanying the reserved Bill, observes that its main provisions are almost a literal copy of provisions which have been for some time past in force in Canada and other North American Colonies ; and I observe that, in the various communications before me, the argument is repeatedly pressed that the Australasian Colonies are entitled to the same treatment in this respect as the North American Colonies. It may be as well, therefore, to explain what these provisions actually are.

I enclose extracts from the Acts of Newfoundland [1] and Prince Edward Island [1] of the year 1856 ; but I need not

[1] Prince Edward Island, 19 Vict. c. 1 ; Newfoundland, 1856, c. 1. The former Act gave preferential terms to Nova Scotia, New Brunswick, Newfoundland, and Canada. The latter gave by s. 5 certain preferences exclusively to the Maritime Provinces. See Canada *Sess. Pap.*, 1869, No. 47.

dwell upon them, because as dealing with a limited list of raw materials and produce not imported to those Colonies from Europe, they are hardly, if at all, applicable to the present case, and I shall refer only to the Act passed by the Dominion of Canada in 1867 (31 Vict. c. 7), which is the enactment principally relied upon as a precedent.

Schedule D of this Act exempts from duty certain specified raw materials and produce of the British North American Provinces, and the third section enacts that 'any other articles than those mentioned in Schedule D, being of the growth and produce of the British North American Provinces, may be specially exempted from Customs duties by order of the Governor in Council'.

This, which was one of the first Acts of the Legislature of the newly-constituted Dominion in its opening session, was passed in the expectation that, at no distant date, the other Possessions of Her Majesty in North America would become part of the Dominion, and the assent of Her Majesty's Government to a measure passed in circumstances so peculiar and exceptional cannot form a precedent of universal and necessary application; although I am not prepared to deny that the Australasian Governments are justified in citing it as an example of the admission of the principle of differential duties.

With reference to the second question, as to the existence of any Treaty, the obligations of which might be inconsistent with compliance by Her Majesty with the present proposal, the Board of Trade have informed me that this point could only be raised in connexion with the terms of the Treaty between this country and the Zollverein of 1865, extended through the operation of the 'most-favoured-nation' Article to all other countries possessing rights conferred by that stipulation.

The Seventh Article of that Treaty, which extends the provisions of previous Articles to the Colonies and Foreign Possessions of Her Majesty, contains the following provision:—

'In the Colonies and Possessions the produce of the states of the Zollverein shall not be subject to any higher or other import duties than the produce of the United Kingdom of Great Britain and Ireland, or of any other country, of the like kind.'

I am advised that this Seventh Article may be held not to preclude Her Majesty from 'permitting the Legislature of a British Possession to impose on articles being the produce

of the States of the Zollverein any higher or other import duties than those which are levied on articles of the like kind which are the produce of another British Possession, provided such duties are not higher or other than the duties imposed on articles of the like kind, being the produce of the United Kingdom of Great Britain and Ireland.'

But apart from the strict interpretation of the Treaty, it seems very doubtful whether it would be a wise course on the part of the Australasian Colonies, which, both as regards emigration and trade, have more extensive relations with Germany than with, perhaps, any other foreign country, to place German products and manufactures under disadvantage in the Colonial markets.

Proceeding to the third question, Whether, if the principle of allowing the imposition of differential duties were conceded, the Colonies could be permitted to impose such duties without the express sanction of the Imperial Government in each particular case? you will be prepared, by what I have already said, to learn that I consider it open to serious doubt whether such absolute freedom of action could be safely given.

Her Majesty's Government are alone responsible for the due observance of Treaty arrangements between foreign countries and the whole Empire, and it would be scarcely possible for the Colonial Governments to foresee the extent to which the trade of other parts of the Empire might be affected by special tariff agreements between particular Colonies.

It must, moreover, be anticipated that these differential agreements, being avowedly for the supposed benefit of certain classes of the community, would be liable to be affected by temporary political circumstances. The door having been once opened, each producing or manufacturing interest, and even individuals desirous of promoting any new enterprise, might in turn press for exceptionally favourable treatment under the form of inter-colonial reciprocity, while the real grounds for such changes as might be proposed would be intelligible only to those concerned with local politics.

It would appear, therefore, to be by no means clear that Her Majesty's Government could be relieved from the obligation of examining the particulars of each contemplated agreement, however limited; and while it would be very difficult for them to make such an examination in a satisfactory manner, a detailed inquiry of this kind could hardly fail to be irksome to the Colonies, and to lead to misunderstandings.

It remains for me, lastly, to ask how far it is expedient,

in the interests of each Colony concerned, and of the Empire collectively, that the Imperial Parliament should be invited to legislate in a direction contrary to the established commercial policy of this country ?

Her Majesty's Government are bound to say that the measure proposed by the Colonial Governments seems to them inconsistent with those principles of free trade which they believe to be alone permanently conducive to commercial prosperity, nor, as far as they are aware, has any attempt been made to show that any great practical benefit is expected to be derived from reciprocal tariff arrangements between the Australasian Colonies.

At all events I do not find anywhere among the papers which have reached me those strong representations and illustrations of the utility or necessity of the measure which I think might fairly be expected to be adduced as weighing against its undeniable inconveniences.

It is, indeed, stated in an address before me that the prohibition of differential customs treatment 'operates to the serious prejudice of the various producing interests of the Australian Colonies'. I understand this and similar expressions to mean that it is desired to give a special stimulus or premium to the Colonial producers and manufacturers, and to afford them the same advantages in a neighbouring Colony over the producers and manufacturers of all other parts of the Empire and of foreign countries, as they would have within their own Colony under a system of protective duties. What is termed reciprocity is thus, in reality, protection.

It is, of course, unnecessary for me to observe that, whilst Her Majesty's Government feel bound to take every proper opportunity of urging upon the Colonies, as well as upon foreign Governments, the great advantages which they believe to accrue to every country which adopts a policy of free trade, they have relinquished all interference with the imposition by a Colonial Legislature of equal duties upon goods from all places, although those duties may really have the effect of protection to the native producer.

But a proposition that, in one part of the Empire, commercial privileges should be granted to the inhabitants of certain other parts of the Empire, to the exclusion and prejudice of the rest of Her Majesty's subjects, is an altogether different question, and I would earnestly request your Government to consider what effect it may have upon the relations between the Colonies and this country.

Her Majesty's subjects throughout the Empire, and nowhere more than in Australasia, have manifested, on various occasions of late, their strong desire that the connexion between the Colonies and this Country should be maintained and strengthened, but it can hardly be doubted that the imposition of differential duties upon British produce and manufactures must have a tendency to weaken that connexion, and to impair the friendly feeling on both sides, which I am confident your Government, as much as Her Majesty's Government, desire to preserve.

I have thought it right to state frankly and unreservedly the views of Her Majesty's Government on this subject, in order that the Colonial Governments may be thoroughly aware of the nature and gravity of the points which have to be decided; but I do not wish to be understood to indicate that Her Majesty's Government have, in the present state of their information, come to any absolute conclusion on the questions which I have discussed.

The objections which I have pointed out to giving to the Colonies a general power of making reciprocal arrangements would not apply to a Customs union with a uniform tariff, and although such a general union of all the Colonies is, it appears, impracticable, it may be worth while to consider whether the difficulty might not be met by a Customs union between two or more Colonies.

In reply to this dispatch there was a meeting of Premiers in Melbourne in 1871,[1] when it was agreed to press further upon the Imperial Government the desire to be given a free hand in these matters of inter-colonial preference. To these dispatches a reply was sent by Lord Kimberley on April 19, 1872,[2] in the following terms:—

Her Majesty's Government have had before them your Dispatch, No. of the of , and also the dispatches from the Governors of the other Australasian Colonies, of which copies are enclosed, in reply to my circular dispatch of July 13 of last year.

As the resolutions signed by the delegates of the Australian Colonies, and the memorandum conveying the views of the New Zealand Government relate to the same subject, it will be convenient that I should deal with them in the same dispatch.

Her Majesty's Government have no desire to enter upon

[1] *Parl. Pap.*, C. 576, pp. 13 seq., 18 seq. [2] Ibid., pp. 6 seq.

a controversy on points of detail, as to the tariff arrangements of the Colonies. On the contrary, believing, as they do, that such controversies can scarcely be carried on without leading to misunderstandings and differences, they are anxious that their decision on the questions now before them should be based upon broad principles of policy, so as to avoid the irritation which is sure to arise from constant demands on the one side and concessions on the other. But after an attentive consideration of the various documents submitted to them, Her Majesty's Government are of opinion that, looking to the gravity of the issues raised by the Colonial Governments, involving, as they do, the commercial relations of the whole Empire, and even the right of the Imperial Government to conclude treaties binding the Colonies, they ought not to come to a final decision without further friendly discussion, inasmuch as it appears to them to be required, in order that the nature and extent of the questions which have to be determined may be fully understood, both in this country and in the Colonies. I will, therefore, proceed to examine the demands which are now put forward.

The resolutions signed by the delegates from New South Wales, Tasmania, South Australia, and Victoria, claim that the Australian Colonies shall have the right to make arrangements with each other for commercial reciprocity, that no treaty shall be concluded by the Imperial Government interfering with the exercise of such right; and that Imperial interference with inter-colonial fiscal legislation shall absolutely cease.

The resolutions signed by the delegates from New South Wales, Tasmania, and South Australia, enter into fuller details. They maintain the right of the Australian Legislatures to control their fiscal policy as between themselves, without interference on the part of the Imperial Government; they express the desire that the connexion between this country and her Colonies in Australia may long continue; they deny that any treaty can be constitutionally made which treats those Colonies as foreign countries; they maintain that foreign Governments ought not to be allowed to become parties to stipulations respecting the trade of one part of the Empire with another, whether by land or sea; they declare that, if the Article in the Treaty with the Zollverein, referred to in my above-mentioned dispatch, were interpreted so as to prevent the Australian Colonies from imposing differential duties as between themselves and foreign countries, those Colonies would claim to be considered

free from the obligation ; and they refer to the agreement between New South Wales and Victoria as to border duties, as a precedent for reciprocal arrangements between the Colonies. Lastly, the delegates who sign these resolutions, whilst they agree that efforts should be made in the Colonial Legislatures to provide for mutual freedom of trade, assert the right of the Colonies which they respectively represent to impose such duties on imports from other places, not being differential, as each Colony may think fit.

The memorandum by Mr. Vogel, expressing the views of the New Zealand Government, commences by an examination of the Acts which have been passed, giving to the British North American Colonies certain powers as to reciprocity with each other and with the United States ; it then proceeds to discuss the question of treaty obligation, and on this point it observes that ' it is a matter which should create much satisfaction on broad and enlightened national grounds that the right of Her Majesty's Colonies to make between themselves arrangements of a federal or reciprocal nature, without conflicting with treaty agreements, has been recognized '.

The New Zealand Government think ' it would have been demoralizing to the young communities of Australasia had they been taught to believe that reciprocal tariff arrangements between the Colonies were inconsistent with Her Majesty's Treaties with Foreign Powers, but that they could override the spirit of such treaties by the subterfuge or evasion of a Customs union '.

They suggest that the object of the Zollverein Treaty ' seems to be to prevent the Colonies making such reciprocal arrangements with the United Kingdom of Great Britain and Ireland as from time to time may be found desirable ', and they ask ' why a Foreign Treaty should contain a provision tending to preclude the union of different parts of the Empire ? '

They urge that in considering the subject, the question should not be confined to that of mere inter-colonial arrangement.

' It may be for the interest of the Australian Colonies, just as much as it has been for that of the British American Colonies, that arrangements should be made to admit free articles from the United States or from some other country. It is desirable that the Secretary of State should define the position of the Australasian Colonies in this respect.'

They conclude by pointing out that ' Great Britain must

logically do one of two things—either leave the Colonies unfettered discretion; or, if she is to regulate tariffs or reciprocal tariff arrangements, or to make treaties affecting the Colonies, give to the Colonies representation in matters affecting the Empire. In other words, she must apply in some shape to the Empire that federation which, as between the Colonies themselves, Her Majesty's Ministers constantly recommend. To urge the right of Great Britain to regulate these matters under present circumstances, is to urge that the interests of the Colonies should be dealt with in the absence of the requisite knowledge of their wants and requirements.'

It is apparent at once that these propositions, taken together, go far beyond what was understood by Her Majesty's Government to be the original request—namely, that the Australasian Colonies should be permitted to conclude agreements amongst themselves securing to each other reciprocal tariff advantages.

I will deal, in the first place, with the point raised as to the obligation of the Australian Colonies to conform to the Seventh Article of the Zollverein Treaty.

Her Majesty's Government apprehend that the constitutional right of the Queen to conclude treaties binding all parts of the Empire cannot be questioned, subject to the discretion of the Parliament of the United Kingdom or of the Colonial Parliaments, as the case may be, to pass any laws which may be required to bring such treaties into operation.

But no Acts of the Australian Legislatures could be necessary to give validity to a stipulation against differential duties, inasmuch as, by the *Australian Colonies Government Act*, 13 & 14 Vict. c. 59, s. 27, it is provided that 'no new duty shall be imposed upon the importation into any of the said Colonies of any article, the produce and manufacture of, or imported from, any particular country or place, which shall not be equally imposed on the importation into the same Colony of the like article, &c., from all other countries and places whatsoever'. And the Constitution Acts of New South Wales, Victoria, and Queensland contain like provisions. Moreover, the *Australian Colonies Government Act*, and the New Zealand *Constitution Act* prohibit the Colonial Legislatures from levying any duty, imposing any prohibition or restriction, or granting any exemption or privilege upon the importation or exportation of any articles contrary to, or at variance with, any treaty concluded by Her Majesty with any foreign Power.

If, therefore, Article VII of the Zollverein Treaty were construed to prevent the Australian Colonies from imposing higher duties upon goods imported from the Zollverein than upon goods imported from each other, it is manifest that Her Majesty would not have exceeded her constitutional powers in agreeing to such a stipulation, and that the Colonies could not refuse to consider themselves bound by it without repudiating the treaty.

Her Majesty's Government, after a further careful examination of the Zollverein Treaty, remain of opinion that the strict literal interpretation of the Seventh Article of that treaty does not preclude the imposition of differential duties in one British Colony or Possession in favour of the produce of another British Colony or Possession: but they must, at the same time, point out that it could hardly have been intended that, by reciprocal arrangements between Colonies, perhaps far distant from each other, the produce of the Zollverein should be placed at a disadvantage as compared with Colonial produce, whilst Colonial produce should enjoy, in the ports of the Zollverein, all the privileges of the most favoured nation.

No doubt the negotiators of the treaty thought that they had obtained sufficient security for the Zollverein, as regards the inter-colonial trade, by the provision that, 'in the Colonies and Possessions of Her Majesty, the produce of the States of the Zollverein should not be subject to any higher or other import duties than the produce of the United Kingdom'; but if the Colonies are to be at liberty to impose differential duties as against British produce, it is obvious that this security altogether disappears.

Apart, however, from the obligations of existing treaties, it is necessary to consider the effect of the general views expressed by the Australian and New Zealand Governments on the subject of Commercial Treaties.

It is easy to understand the claim asserted in the second of the resolutions to which the Victorian delegates were parties, that no treaty entered into by the Imperial Government with any foreign Power should in any way limit or impede the exercise of the right of the Australian Colonies to enter into reciprocal tariff arrangements with each other; but it is not at first sight so clear what is meant by the statement in the other set of resolutions that no treaty can be properly or constitutionally made, which directly or indirectly treats those Colonies as foreign communities.

It seems inconsistent to object to stipulations which treat

the Colonies as separate communities, so far as relates to their fiscal arrangements, on the ground that the Colonies are thus treated as foreign communities, when a claim is at the same time set up by the Colonies to treat the United Kingdom itself as a foreign community, by imposing differential duties in favour of other parts of the Empire, as against British produce.

But the meaning is, I apprehend, to be gathered from the succeeding paragraph, which affirms that foreign Governments ought not to be allowed to become parties to stipulations respecting the trade of one part of the Empire to another, whether by land or sea : and further light is thrown upon it by the observations in the New Zealand Memorandum, that the object of the treaty with the Zollverein seems to be to prevent the Colonies making reciprocal arrangements with the United Kingdom, that ' if Great Britain were to confederate her Empire, it might, and probably would, be a condition that, throughout the Empire, there should be a free exchange of goods ', and that the effect of the Zollverein Treaty ' is to make Great Britain hold the relation of a foreign country ' to her Colonies.

It seems, therefore, to follow that, in the opinion of some at least of the Australasian Governments, the ports of the United Kingdom should not, as at present, be open to the produce of the whole world on equal terms, but that the produce of the Colonies should be specially favoured in British ports ; or, in other words, that we should abandon the principles of free trade, and return to the old system of differential duties. The New Zealand Memorandum, indeed, suggests that the best arrangement would be a Customs union embracing the whole Empire, but it may, perhaps, be thought that if it has been found impossible for adjacent communities, such as those of Australia, to come to an agreement for a common system of Customs duties, it is scarcely worth while to consider the possibility of so vast a scheme as the combination of all parts of the British Empire, scattered over the whole globe, under such widely varying conditions of every kind, in one Customs union. But apart from the insuperable practical difficulties of such a scheme, it is sufficient to point out that its results, if it could be adopted, would certainly not be to promote the views of commercial policy set forth in the papers now under consideration. For, in such a Customs union, Great Britain, with her wealth and population, must, for an indefinite period, exercise a greatly preponderating influence, and it

is not to be supposed that the people of this country would, in deference to the views of the Colonies, depart from the principles of free trade, under which the trade and commerce of the Empire has attained to such unexampled prosperity.

The New Zealand Government seem not to have perceived the difference in principle between the formation of a Customs union and the conclusion of reciprocity agreements. Customs unions, which have hitherto, as far as I am aware, never been formed except between neighbouring communities, have for their object the removal of the barriers to trade created by artificial boundaries, and the establishment of a cheaper and more convenient mode of collecting the Customs revenue of the united countries. But the formation of such a union does not, in itself, involve any question of protection to native industry, nor of inequality of treatment of imports from countries not belonging to the union. On the other hand, such reciprocity arrangements as the Colonies desire to conclude, are not confined to the promotion of free intercourse between each other, but are intended to secure for the trade of the respective Colonies special advantages, as against imports from other places, in return for corresponding concessions. It is no doubt true, as the New Zealand Memorandum points out, that reciprocity agreements might somewhat mitigate the evils of the 'retaliatory tariffs of a protective character which have grown up' in the Australasian Colonies. But, although they might avert the ruinous policy of retaliation, they would also tend to perpetuate and strengthen the system of protection, and to aggravate in other quarters the very evils which as between the favoured Colonies they would professedly diminish.

A Customs union, while it would incidentally secure important advantages to native industry, by the removal of all obstacles to internal trade, would do so without establishing the principle of differential duties.

The Colonies forming the union might, no doubt, pursue a Protectionist policy, and as Her Majesty's Government have ceased to interfere with the right of the self-governing Colonies individually, as claimed in the Memorandum signed by the New South Wales, Tasmanian, and South Australian delegates, 'to impose such duties on imports from other places not being differential as each Colony may think fit,' they would have no reason for interfering with the right of a Colonial Customs Union to impose such duties; but there would be nothing in the union itself, as there would be in the proposed reciprocity agreements, inconsistent with

the maintenance of the present rule against differential duties.

Moreover, if the principle of differential duties were admitted, it would be very difficult to limit the application of the principle to agreements between particular Colonies.

The New Zealand Memorandum points out that 'the vast limits of the United States bring that country into ready communication with Australia as well as with British America, and that it may be for the interests of the Australasian Colonies, just as much as it has been for that of the British American Colonies, that arrangements should be made to admit free articles from the United States, or from some other country.'

These are the logical consequences of the adoption of the system of reciprocity agreements, but no such questions are involved in the establishment of a Customs union.

It is observed in the New Zealand Memorandum that the measure proposed by the Colonial Governments may be used to make similar arrangements to those which were introduced in the treaty with France, devised by the late Mr. Cobden.

Her Majesty's Government would certainly have no ground for objection if the Colonial Governments proceeded upon the principles which were acted upon by this country in the case of that treaty. Instead of establishing differential duties, the British Government extended to all countries the benefit of the concession made to France; and, far from seeking any exclusive privileges for British trade, they cherished the hope, unfortunately now frustrated, that the treaty would pave the way to the complete adoption by France of the system of free trade with all nations.

Some stress is laid upon the agreement made in 1867 between Victoria and New South Wales respecting the duties on the land frontier between the two Colonies, as affording a precedent for reciprocity agreements between the Colonies. It appears to me that the agreement of 1867 was rather of the nature of a limited Customs union. No differential duties were imposed under it upon goods entering the ports of Victoria or New South Wales; but, so far as concerned commercial intercourse by land, the two Colonies were united, the loss to the New South Wales Treasury by the arrangement being redressed by a yearly payment of £60,000 by Victoria.

The precedents in the case of the North American Colonies are, however, to a certain extent in point, as I have already admitted in my dispatch of July 13 last year. It may indeed be observed that, as the whole of the British Posses-

sions on the Continent of North America are now united in one Dominion, the application of the principle of inter-colonial reciprocity is exceedingly limited, being confined to Prince Edward Island and Newfoundland ; and that, as regards reciprocity between the Dominion and the United States, the contiguity of their respective territories along a frontier line now extending across the entire continent renders the case so peculiar, that the precedent cannot fairly be applied to the commercial relations of Australasia, which is separated from the United States by the Pacific Ocean.

But it cannot be denied that reciprocity bargains may be made between countries far remote from each other, and that the ever-increasing facilities of communication between all parts of the world must render it more and more difficult to maintain distinctions based upon merely geographical considerations.

All these complications would be avoided if the Colonies adhered to the free-trade policy of this country. Not the least of the advantages of that policy is that, as it seeks to secure no exclusive privileges, it strikes at the root of that narrow commercial jealousy which has been one of the most fertile causes of international hatred and dissensions.

Her Majesty's Government believe that protectionist tariffs and differential duties will do far more to weaken the connexion between the Mother Country and her Colonies than any expressions of opinion in favour of a severance, such as are alluded to in the resolutions of the delegates from three of the Australian Colonies.

Whilst, however, Her Majesty's Government deeply regret that any of the Australasian Colonies should be disposed to recur to what they believe to be the mistaken policy of protection, they fully recognize, so far as the action of the Imperial Government is concerned, the force of the observations made by the Chief Secretary of Victoria in his Memorandum of October 7, 1871,[1] ' that no attempt can be more hopeless than to induce free self-governed states to adopt exactly the same opinions on such questions as free trade and protection which the people of England happen to entertain at that precise moment ' : and they are well aware, to use again Mr. Duffy's words, ' that the Colonists are naturally impatient of being treated as persons who cannot be entrusted to regulate their own affairs at their own discretion.'

Similarly, Mr. Wilson, Chief Minister of the Tasmanian Government, in his Memorandum of September 11, 1871,[2]

[1] *Parl. Pap.*, C. 576, p. 18.

[2] Ibid., p. 48.

observes that ' it is only on an abstract theory of the superior advantages of a free-trade policy, that the Secretary of State objects to a proposal which seems to sanction protection, under the name of reciprocity. These are views,' he goes on to state, ' which can find no acceptance with Colonial Legislatures, under a system of Constitutional Government.' It is obvious that a prolonged controversy on a subject on which the opinions entertained on either side are, unfortunately, so entirely at variance, would not tend to promote the principles of free trade, opposition to which would become identified in the minds of the Colonists with the assertion of their rights of self-government, and that it could scarcely fail to impair those relations of cordial and intimate friendship, which both the Imperial and the Colonial Governments are equally desirous to maintain.

But although for these reasons Her Majesty's Government might not feel justified in refusing to allow the Colonists to adopt the policy which they think best for their own interests, they desire to point out that, in order to meet the views of the Colonial Governments as expressed in the papers now before me, it would be necessary not only to repeal so much of the *Australian Colonies Government Act*, 13 & 14 Vict. c. 59, as prevents the imposition of differential duties, but to exempt the Colonies in question from the operation of any future commercial treaties which may be concluded by this country, containing stipulations against such duties, leaving them at liberty, subject to the obligations of existing treaties, to make such arrangements as they may think fit, for reciprocity with each other, or with foreign nations ; and before so serious a step is taken, they would ask the Colonists gravely to consider the probable effects of a measure which might tend materially to affect the relations of the Colonies to this country and to the rest of the Empire. In the meantime they have thought it right not to proceed in this matter until the Australasian Governments concerned have had an opportunity of communicating any further observations which they may desire to make in explanation of their views.

The response to the intimation of the views of the Imperial Government was satisfactory : Tasmania repeated the request for legislation, and expressly pointed out that it only asked for powers as to inter-colonial duties, and Victoria concurred in this view, as did Queensland. New Zealand[1]

[1] *Parl. Pap.*, C. 576, pp. 57 seq.

argued all over again the question as regards the question of right to have treaties with differential duties in the case of foreign countries as well, but in 1872 a conference at Sydney representing all the Colonies and New Zealand asked for powers as to Australasian inter-colonial duties only, and these were conceded by the Imperial Act of 1873,[1] which, however, contained still the prohibition of differential duties in case of other British territories and foreign states and duties contrary to treaties.

The clauses of the Imperial Acts as to differential duties were not finally removed until the passing of the Act of 1895.[2] The passing of that Act was the outcome of the Ottawa Conference of 1894, to which allusion will be made elsewhere. The conference asserted the principle of preference among the different parts of the Empire, and demanded the abrogation of the treaties of 1862 with Belgium and of 1865 with the Zollverein, which hampered the granting by the Colonies of a preference to the Mother Country. It was not deemed expedient at that time by the Government of the day to accede to that request, but they yielded to the further request that all legal fetters on inter-colonial preference should be removed, and they accordingly repealed by the Act of 1895 the proviso to the Act of 1873,[3] which lays down that 'no new duty shall be imposed upon and no existing duty shall be remitted as to the importation into any of the Australian Colonies of any article, the produce or manufacture of any particular country, which shall not be equally imposed upon or remitted as to the importation into such Colony of the like article the produce or manufacture of any other country'.

It is somewhat curious that the Imperial Government should have treated Canada so differently in this regard in the early days before federation: it is clear from the cases which were cited by the New Zealand Government[4] in the

[1] 36 & 37 Vict., c. 22; *Hansard*, ccxv. 1998–2011; ccxvi. 153–8; cf. Holland, *Imperium et Libertas*, pp. 288 seq.

[2] 58 & 59 Vict. c. 3; *Hansard*, xxxi. 646, 647, 699, 852, 1533, 1534.

[3] Also 13 & 14 Vict. c. 59, s. 27.

[4] *Parl. Pap.*, C. 703, pp. 8 seq. Cf. *House of Commons Papers*, 1846, xxvii. 27–55; 1856, xliv. 169–71; cf. 1864, xl. 697; Adderley, *Colonial Policy*, p. 58.

case of the argument that since 1850 the Imperial Government had assented sometimes reluctantly, sometimes quite readily, to a system of inter-colonial preference in that Dominion, no doubt in anticipation of federation. Moreover, the Imperial Government were most anxious for reciprocity with America for Canada, and arranged such a measure in the Treaty of 1854,[1] whch permitted Canada to accept better terms in American markets than those accorded to England. The difference of treatment corresponded no doubt in great measure to the date when the question arose, and when the question of differential duties had become a matter of much more serious consideration than it was in the early days of Canada, when free trade was slowly developing. Moreover, it is clear that some of the objections felt by the Imperial Government were based on a not unnatural reluctance to see the tariff barriers already rising in Australia increased as against England.

As a matter of fact, after all the enthusiasm of the Colonies for the Act of 1873 they took no real advantage of it, and the benefits of inter-colonial preference began only to be seen in quite recent history, when Canada commenced the plan of granting the Imperial Government preference. Mr. Seddon, after arrangements in 1895 with South Australia and Canada, adopted the plan of arranging a preferential agreement in 1906 with the South African Customs Union, which is still in force, and under which the two Dominions exchange reductions on certain articles of produce. A similar agreement was negotiated by Australia with New Zealand, but the agreement failed to secure approval in New Zealand, and has so far not been revived. Negotiations between Canada and Australia have not led yet to any agreement.[2]

[1] Repeated in a very minor degree in the standing offer contained in every Canadian tariff of a degree of reciprocity in natural products from 1867–94, and carried out as regards fish products in the Washington Treaty of 1871, which terminated in 1885. But it was renewed in a substantial form by the abortive tariff arrangements of January 1911; *Parl. Pap.*, Cd. 5512, 5516. Cf. also Ewart, *Kingdom of Canada*, pp. 137 seq.

[2] Cf. Commonwealth *Parliamentary Debates*, 1908–9, p. 837; *Canadian Annual Review*, 1910, p. 105; *Parl. Pap.*, Cd. 3524, pp. 419 seq.

The Canadian preference first accorded in 1897, when its appearance was celebrated by one of Mr. Rudyard Kipling's best poems, was increased at the next revision of the tariff, and stands still very high in favour of Great Britain.[1] It is conceded entirely as a free gift in recompense for the part played by the Imperial power in the Empire, and it is given without conditions, though alike in 1902 and 1907 at the Colonial Conferences Canada offered further preference in return for a preference in British markets. It has recently been recognized by the Royal Commission, which has suggested the basis for a reciprocity arrangement between Canada and the West Indies, that any advantage extended to these Colonies by Canada shall be accorded gratis to the Mother Country. This, it will be seen, is in accordance with the principles laid down in regard to these negotiations as regards foreign Powers by Lord Ripon in 1894, but it was not the principle adopted in the Act of 1873, which allowed the Colonies of Australia to shut out the Mother Country from any inter-colonial preference.

§ 2. Currency

The intervention of the Crown in currency matters can be disposed of briefly. Coinage is a royal prerogative, and currency figures prominently among the earlier cases of disallowance. In 1843 a New Brunswick Act was disallowed because the rates of value of the coins were not specified correctly.[2] In 1845 a refusal was sent to a proposal by the Legislature of Prince Edward Island that it should be allowed to issue £10,000 in Treasury notes, redeemable in fifteen years, and a contemporaneous request to be allowed to suspend the repayment of Treasury notes was also refused.[3] In 1851 a Canadian Act of 1850 (c. 8) in respect of currency, which the Governor-General had assented to, was disallowed on the ground that it ought to have been reserved under the royal instructions, that it purported to confer upon the

[1] Cf. Ewart, op. cit., pp. 255–73; Willison, op. cit. ii. 279–312; Sir W. Laurier in Canadian House of Commons, March 7, 1911.

[2] *Parl. Pap.*, H. C. 529, 1864, p. 34. [3] Ibid., p. 40.

Governor-General the royal prerogative of coinage, and that it fixed without the previous consent of the Imperial Government the value in Canada of certain foreign coins, thus upsetting the control of that Government regarding currency.[1] Other Bills were passed in 1851 and 1853 dealing with the subject, but there was no further infringement of the prerogative, and the Bills were not to take effect until after the royal sanction had been obtained. The Coinage Acts of the Dominion enacted in 1871 (c. 4), and consolidated and amended as *Rev. Stat.*, 1906, c. 25, recognized the royal prerogative, and provided for the issue of a royal proclamation fixing the nominal rates at which coins struck for use in Canada were current. By an Act 9 & 10 Edw. VII. c. 14 the whole affair is now placed on a statutory basis, and the Governor in Council is given the royal authority.

In 1866 the Governor of Queensland was pressed by his ministers to consent to the issue of an inconvertible paper currency, but the Governor declined to do so, though there was a financial crisis, suggesting instead the issue of treasury bills coupled with the introduction of fresh taxation. This course his ministers refused to accept, and tendered their resignations, though he pointed out that he was acting in accordance with the royal instructions, which, as then worded, forbade the assent of the Governor to the passing of any Bill making paper legal tender. He agreed, however, to let them introduce the Bill into Parliament, while he undertook to communicate with the Secretary of State, but as they insisted on resigning he sent for Mr. Herbert, who took office, and introduced a Bill allowing the issue of treasury bills for £300,000, which was promptly passed. Afterwards certain of the colonists petitioned for Sir George Bowen's recall because of his action in this case, but he was upheld by the Secretary of State.[2]

In the Newfoundland crisis of 1895 the Governor tele-

[1] Canada *Legislative Assembly Journals*, 1851, App. Y.Y.; 1852–3, App. P.; *Sess. Pap.*, 1870, No. 40. Cf. 31 Vict. c. 45.

[2] Queensland *Legislative Assembly Journals*, 1866, p. 952; *Votes*, 1866, pp. 437–47; 1867, pp. 81, 83; Rusden, *Australia*, iii. 598, 599.

graphed to know if in view of his instructions he could assent to a Bill for registering the notes of the several banks, and endorsing the notes with a Government guarantee of payment at a valuation reported by a joint committee of the two Houses of the Legislature, and arranging for their payment in due course by the Government if the funds of the banks turned out to be inadequate. The Governor was told that he could assent, it being understood that the Government accepted no responsibility for the redemption of the notes by authorizing such assent.[1]

The legislation of Newfoundland for 1910 included an Act respecting currency notes which was not to come into force until the royal approval had been given, and this approval was duly given in due course, the currency notes not being really a form of paper currency at all, but being orders for money payable to men employed on public works, or given by way of relief instead of cash, to save risks of loss and of delay. Such notes are presented for payment to the merchants of the capital, and are at once by them converted into cash.

A new departure has been taken in 1909 by the Commonwealth of Australia. Hitherto it had been content to accept the usual system in force in those Colonies where British money is the legal tender. In these cases the Colony was not responsible for the provision of silver coinages to such extent as might be necessary : they were entitled to obtain what coins they desired from the Treasury on paying the face value, while the British Government remained responsible for carriage, the renewal of worn-out coins and so forth, receiving on the other hand the benefit of the profits on the coinages.[2] The Commonwealth Government at the Colonial Conference of 1907[3] asked that they might receive a share

[1] See *Parl. Pap.*, H. C. 104, 1895, pp. 6–9.

[2] *Per contra*, the places which use non-British silver coinage have them coined in England, but pay expenses and take profits, and are responsible for regulating coinage ; see Chalmers, *Colonial Currency* ; Jenkyns, *British Rule and Jurisdiction beyond the Seas*, pp. 28–30.

[3] *Parl. Pap.*, Cd. 3523, pp. 190–2, 546, 547 ; 3524, pp. 170–2 ; 5273, pp. 158–63 ; 5745, pp. 168, 169, 370, 371 ; 5746–1, p. 204.

in the profits, and accordingly an arrangement was made by which they were to have a coinage system of their own, which should be special to Australia, and on which they should receive the profits, though the coinage is manufactured by the Imperial mint in London. This coinage has no validity outside the Commonwealth unless validity is given to it by local Act in any Colony, or by proclamation under the *Coinage Act*, 1870, as amended in 1891.

Under the latter Act not only has the Crown a paramount power as to coinage throughout the Empire which has never yet been abridged by any Act, but the power is one which has been and still is regularly used in respect of the self-governing Dominions when required. Under the system in force there are subordinate mints at Melbourne since 1872, Sydney since 1855, Perth since 1898, and at Ottawa since 1907, the staffs of which are under the control of the Imperial Government, and work in accordance with the rules laid down by that Government, though the cost of the mints is provided by the Colonial Governments concerned, who receive the profits of the coinages. The gold coins struck at those mints are valid tender wherever a British gold coin is valid tender.[1]

On the other hand, there is local legislation in Canada regarding local coinages, the acceptance of British gold current in the United Kingdom (s. 9), the rates and values of dollars and cents, and the acceptance of foreign coins such as the American coins. Again, the new silver coinage of the Commonwealth was provided for by a Commonwealth Act, No. 6 of 1909, and the same Act also deals with gold

[1] See for the Orders in Council, *Stat. R. and O. Rev.*, viii. 627–41 ; *Stat. R. and O.*, 1894, p. 33 ; 1896, p. 13 ; 1900, p. 21 ; Quick and Garran, *Constitution of Commonwealth*, p. 574 ; Canada, *Rev. Stat.*, 1906, c. 26 ; Order in Council, November 2, 1907. The distinctive silver coinage of Canada is now normally struck at the Ottawa branch (9 & 10 Edw. VII. c. 14, s. 5), but the Australian coinage is still struck in England (Cd. 5273, p. 161). The Treasury has undertaken to accept current British silver at the Australian mints to an amount not exceeding £100,000 a year, while it continues to redeem worn coins, and also under an Order in Council of March 18, 1908, to redeem worn gold coins on the principles of the *Coinage Act*, 1891.

coinage and legal tender generally. It supersedes the Order in Council of August 1, 1896, regarding currency in the states issued under the Acts of 1870 and 1891, and of course, being merely a Colonial Act, would have had no validity until it was given effect by the repeal by proclamation on January 23, 1911, under the same authority of the Order in Council in question, but it does not affect the position of the Imperial mints in the three states. As in Canada British gold (including gold struck at any branch mint) is legal tender so long as it is so in the United Kingdom. Local legislation also exists in Newfoundland (58 Vict. c. 4), which has a dollar coinage, coined in England at the Mint. It recognizes not only British gold, but also silver and bronze coins as legal tender. Like the Canadian law before 1910 it requires the issue of a royal proclamation to determine values of foreign coins and a similar proclamation to fix the rates at which gold, silver or bronze coins struck for circulation in the Colony shall pass current. It should, moreover, be noted that the royal pleasure is always taken as to the inscriptions on coins and so forth.[1]

New Zealand is still using silver coinage imported from the Mint, and gold coinage minted in Australia or in England, and the Union of South Africa is in the same position.[2]

[1] A minister of New Brunswick who placed his own head on a stamp issue was compelled to resign and the issue recalled (1861); see Hannay, *New Brunswick*, ii. 194. This is of course a less solecism than placing a wrong effigy on coins, for the *ars cudendi* has been since classical times a sovereign right, while stamps have a humbler origin. The *Coinage (Colonial) Offences Act*, 1853, has been in the main superseded by local legislation as authorized in s. 3.

[2] See Orders in Council, August 1, 1896, and January 23, 1911. For Newfoundland, see Order, August 9, 1870. For the branch mints, Chalmers, pp. 445 seq.

CHAPTER VII

MERCHANT SHIPPING

The question of merchant shipping is one in which the Imperial Government has always been directly concerned. British shipping is not only of vital consequence to the country, and its treatment in the Colonies a subject on which the Imperial Government is entitled to make representations, but the treatment of foreign shipping is also a matter of concern, inasmuch as, apart from treaty rights, any action with regard to such shipping which may be considered unfair by foreign countries will unquestionably lead to retaliation on British shipping, without regard to the fact that the action taken may be confined to a portion only of the Empire.

Originally it was the universal practice to keep in the hands of the Imperial Government all legislation regarding merchant shipping, but with the disappearance in 1849 of the system adopted in the Navigation Acts, greater liberty was accorded to the Colonies, and the *Merchant Shipping Act* of 1854,[1] which inaugurated the new system provided by s. 547—

> that the legislative authority of any British Possession shall have power by any Act or Ordinance confirmed by Her Majesty in Council to repeal wholly or in part any provisions of this Act relating to ships registered in such Possession; but no such Act or Ordinance shall take effect until such approval has been declared in such Possession, or until such

[1] This Act as amended by an Act of 1862, 25 & 26 Vict. c. 63, gives Colonial Legislatures power to appoint courts of inquiry into incompetence of or misconduct by masters and mates, and to cancel or suspend certificates subject to review by the Board of Trade or appeal to the High Court in England. Hence the Victoria *Passengers Harbour and Navigation Act*, 1865. But in 1881 it was decided by the Supreme Court of Victoria *in re Victoria Steam Navigation Board, ex parte Allan* (7 V. L. R. 248) that the Victoria Board under that Act could not inquire into a charge of misconduct in the shape of a collision off Cape Jaffa in South Australia, and wider powers were therefore given by 45 & 46 Vict. c. 76 (now 57 & 58 Vict. c. 60, s. 478); see Quick and Garran, *Constitution of Commonwealth*, pp. 359, 360.

time thereafter as may be fixed by such Act or Ordinance for the purpose.

The next step in the emancipation of the Colonial Legislature from the control of the Imperial Parliament was made by the *Merchant Shipping* (*Colonial*) *Act* of 1869, s. 4, which provided that—

after the commencement of this Act, the Legislature of a British Possession by any Act or Ordinance from time to time may regulate the coasting trade of that British Possession, subject in every case to the following conditions :

(1) The Act or Ordinance shall contain a suspending clause providing that such Act or Ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British Possession in which it has been passed.

(2) The Act or Ordinance shall treat all British ships, including the ships of any British Possession, in exactly the same manner as ships of the British Possession in which it is made.

(3) Where by a treaty made before the passing of this Act, Her Majesty has agreed to grant to any ships of any foreign state any rights and privileges in respect of the coasting trade of any British Possession, such rights and privileges shall be enjoyed by such ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the Act or Ordinance notwithstanding.

These provisions are repeated in substance and wording by ss. 735 and 736 of the *Merchant Shipping Act* of 1894, while s. 264 enables the Legislature of a British Possession to apply to any British ship registered in, trading with, or being at any port in the Possession, any provisions of part ii of the Act which would not otherwise so apply, thus enabling a Colonial Legislature to enforce the provisions of part ii of the Act dealing with masters and seamen in the case of British vessels not registered in the United Kingdom, and not therefore falling automatically under part ii, if they trade with the Colony. By ss. 366 and 367 Governors of Colonies are enabled to issue proclamations with regard to emigration ships which are given the force of Imperial law, and the same force is given to Acts passed under s. 264 of the Act.

Moreover, Imperial validity may be accorded to Colonial examinations for certificates and marking of loadlines.

There have been at various times conflicts between the Imperial Government and Colonial Governments as to merchant-shipping legislation.

In Canada several Acts [1] have been amended to meet the views of the Imperial Government, and Acts of 1891 and 1893,[2] which dealt with loadlines, were never allowed to come into operation, as the Imperial Government were not satisfied that the Canadian loadline was sufficiently satisfactorily marked as to justify the giving to it of Imperial validity.

The Act still stands as part xv of the Canada *Shipping Act* (*Rev. Stat.*, c. 113) of 1906, but is not in force until a proclamation is issued by the Governor-General, which could not be done without Imperial consent.

Moreover, certain Colonial Acts in Australia have been questioned on this ground. But the first serious dispute between a Dominion Government and the Imperial Government arose in connexion with the New Zealand Act regarding shipping and seamen of 1903, which was reserved by the Governor and only assented to just before the period of two years in which assent is possible was expiring, on the understanding that the questions raised would be decided by a conference to be held in London.[3]

Similar questions presented themselves in connexion with the Navigation Bill of the Australian Commonwealth, which

[1] e. g. one of 1878 regarding the space occupied by deck cargoes, repealing (under s. 547 of 17 & 18 Vict. c. 104) as regards *all* ships in Canadian waters, s. 23 of the Imperial Act of 1876. It was re-enacted as 42 Vict. c. 24, restricted to vessels subject to Canadian law. Cf. *Parl. Pap.*, H. L. 196, 1894, p. 3 ; Lefroy, *Legislative Power in Canada*, p. 642, note 1. As regards Canadian collision rules under 31 Vict. c. 58, see *The Eliza Keith* (1877), 3 Q. L. R. 143 ; *The Hibernian*, 4 P. C. 511, at pp. 516, 517.

[2] See c. 40 of 1891 and c. 22 of 1893.

[3] *Parl. Pap.*, Cd. 2483 (1905). A South Australian Act (No. 454) of 1891 regarding the measurement of ships was never assented to (*Parl. Pap.*, H. L. 196, 1894, p. 10 ; Commonwealth *Parliamentary Debates*, 1910, pp. 4415 seq.), nor a Western Australia Act, 1896, No. 25 (with a suspending clause), which purported to regulate the coasting trade (ibid., H. C. 184, 1906, p. 5).

was introduced in 1904, referred to a Royal Commission in Australia, and which formed the subject of correspondence between the Imperial and Commonwealth Governments.[1]

In the course of the discussion with the Commonwealth Government, it was argued by the Commonwealth Law Department, in a memorandum laid before the Australian Royal Commission, that the proposed legislation was not, as held by the Imperial Government, *ultra vires* the Commonwealth.[2] The Law Department was of opinion, in the first place, that the power to legislate for peace, order, and good government was wide enough to sanction in the case of ships extra-territorial jurisdiction, but of more importance was the argument that the Commonwealth possessed power with respect to navigation and shipping independent of that conferred by the Act of 1894, and this view has been accepted by the Commonwealth Government, which laid it down that the power to legislate as to shipping rested on ss. 51 (1) and 98 of the Constitution. It is clear that this contention is so far correct that the power to legislate does not rest on ss. 735, 736 of the *Merchant Shipping Act* 1894; that Act affects the mode of exercising the power, and the legislative authority depends on the Constitution Act of the Legislature. The real question at issue is how far these sections affect legislation by the Dominions. Mr. Garran suggests that s. 736 is an enabling clause and not a restricting clause, and on this theory he has some difficulty in accounting for its provisions. He suggests that it gives an extra-territorial operation [3] to the law of the Colony, but he is not clear as to what the exact purpose of the section was, but he holds that it does not mean that legislation as to coasting trade can only be valid if carried out in the form described in s. 736, that is, subject to the condition

[1] *Parl. Pap.*, Cd. 2483, 3023.

[2] Ibid., Cd. 3023, pp. 61, 62. See Keith, *Journ. Soc. Comp. Leg.*, ix. 212 seq., and cf. Cd. 4355, pp. 19, 20.

[3] Quick and Garran, op. cit., p. 361, did not take this view, and the Australian delegates at the Conference of 1900 also thought that s. 736 gave no extra-territorial authority, but they were arguing *ex parte*; cf. Keith, *Journ. Soc. Comp. Leg.*, x. 123–5.

of containing a suspending clause and treating all British vessels wherever registered alike. S. 735, he considers, enables a Colonial Legislature to repeal clauses of the Act of 1894 which apply to a Colony, and he suggests that unless such repeal is needed, the provisions of s. 735 as to the insertion in the Act of a suspending clause, and the confirmation by Order in Council, do not need to be observed.

As a matter of fact, the clauses which are now embodied in ss. 735 and 736 of the Act of 1894 were passed to supersede a system of restriction which would have made legislation on the subject in question in the Colonies *ultra vires* as being repugnant to definite provisions of Imperial laws. Ss. 735 and 736 are really intended to confer powers to deal with Imperial provisions and to repeal them, and therefore they contain provisions to secure that the Imperial Government shall be fully consulted before these wide powers are carried out. Moreover, both these sections are adequate to confer extra-territorial validity on the laws of the Colonies passed under them. When this is recognized it will be seen that the clauses are at once enabling and restrictive; they give a power to a Colonial Legislature which was greater than it would normally have possessed, but on the other hand they imposed conditions upon the exercise of that power, and these conditions, in view of the great Imperial interests involved, cannot reasonably be held to be unfair or unjust. Nor is it possible to accept the view apparently suggested in a dispatch from Mr. Deakin of June 15, 1908, that the *Constitution Act* of 1900 implicitly repealed the *Merchant Shipping Act* of 1894. This principle has been contended for by Canada in respect of copyright, but may be regarded as definitely impossible to be upheld.[1] Moreover, it was admitted in the discussion between the delegates and Mr. Chamberlain in 1900 that the *Colonial Laws Validity Act*, 1865, must apply to the Commonwealth.

It is another and very difficult matter to decide exactly how far the *Merchant Shipping Act* restricts Colonial legisla-

[1] Cf. 'Historicus's' letter to *The Times*, June 1, 1876, where in connexion with merchant shipping this doctrine was definitely refuted.

tion. It is, indeed, a more or less complete code and, prima facie, should regulate all British ships which are not registered or coasting in the Dominions. But to what extent can Dominion Parliaments add further conditions? To what extent do the positive provisions laid down exclude other provisions being laid down by Dominion Parliaments? For example, the Imperial Act does not provide for survey of non-passenger vessels. It is therefore doubtful whether the acceptance of provisions is to be regarded as forbidding such legislation, or whether it leaves it open for the Parliament of the Commonwealth to require, as it does in the Navigation Bill, all steam vessels to be surveyed regularly. On grounds of convenience, it has been argued by merchant shippers in the United Kingdom that as long as they comply with the regulations laid down by the Board of Trade they should not be subject to other legislation, whether as to survey, the provision of appliances with regard to safety, the adjustment of compasses, and so forth. But it is not so clear, and in each case it is a matter for consideration on the wording of the legislation, whether such legislation is or is not repugnant to the Imperial Act.

In some cases the repugnancy is clear but unimportant. For example, the Commonwealth Navigation Bill and the New Zealand Act confer on the minister and not on the Governor the power to allow a prosecution for sending a British ship to sea in an unworthy condition, while s. 457 of the Imperial Act clearly gives the power, and no doubt deliberately, to the Governor. The power, therefore, in cases other than those referring to registered or coasting vessels must be held to be given improperly to the minister, and this is a distinction of some consequence, for the Governor or the minister in a self-governing Colony are not necessarily synonymous. Or again, the New Zealand Act and the Commonwealth Bill transfer to the Dominion and the Commonwealth respectively the proceeds of wreck, which legally in part still belong to the Imperial Crown. Then again, part xi of the Act as to lighthouses apparently restricts the power of Colonial Legislatures to levy light dues, and the

New Zealand Act and the Commonwealth Lighthouses Bill of 1911 both ignore these sections. But it seems impossible to accept the view that these provisions are *ultra vires*. The procedure laid down in the Imperial Act applies and must be followed, if it is desired in virtue of that Act to insure the payment of dues by all vessels, and the local Act can only be effective in regard to vessels which come into the ports or territorial waters of the Colony. On the other hand, it is not doubtful that parts i, ii, vi, viii, xiii, and xiv in great measure apply to the Colonies. There is a clear conflict of jurisdiction between the provision of the Commonwealth Navigation Bill, which prohibits the use in Australia of a certificate of an officer cancelled in the Commonwealth and then re-issued by the Board of Trade. Unless restricted to the case of coasting and registered vessels the clause must be regarded as certainly *ultra vires* the Commonwealth Parliament.

The question of the powers to be exercised by the Governments of the Dominions with regard to merchant-shipping legislation was exhaustively discussed in 1907, at the Navigation Conference of that year. Australia and New Zealand were adequately represented, and though much divergence of opinion displayed itself during the discussions, ultimately a full agreement was come to with regard to the principles on which the merchant-shipping legislation of the Dominions should be based.

The discussion which took place was, as far as was possible compatibly with the nature of the subject, not based merely on legal grounds or on the interpretation of the existing Acts, but was based upon considerations of expediency and convenience. The important resolution is No. 9 as explained by No. 10, which reads as follows :—[1]

9. *Vessels to which Colonial Conditions are applicable*

That the vessels to which the conditions imposed by the law of Australia or New Zealand are applicable should be (*a*) vessels registered in the Colony, while trading therein,

[1] *Parl. Pap.*, Cd. 3567, p. v.

and (*b*) vessels wherever registered, while trading on the coast of the Colony; that for the purpose of this Resolution a vessel shall be deemed to trade if she takes on board cargo or passengers at any port in the Colony to be carried to and landed or delivered at any port in the Colony.

Passed unanimously.

10. *Coasting Trade.*

A vessel engaged in the oversea trade shall not be deemed to engage in the coasting trade merely because it carries between two Australian or New Zealand ports,

(*a*) passengers holding through tickets to or from some oversea place,

(*b*) merchandise consigned on through bill of lading to or from some oversea place.

Passed unanimously.

Since that conference the Parliament of New Zealand in an Act, No. 36 of 1909, has legislated so as to carry out in its application to New Zealand the resolution of the conference by limiting to vessels coasting in New Zealand, or registered in the Dominion, the application of such provisions of the New Zealand shipping legislation which differ from the provisions of the Imperial *Merchant Shipping Acts*.[1]

The only point of any consequence in which the legislation of New Zealand as contained in the consolidating Act No. 178 of 1908 and in the amending Act of 1909, to which the royal assent was only given in March 1911 on a promise of amendment to restrict the operation of the provision to goods shipped from New Zealand, is open to criticism, is the provision in s. 41, which requires that the conditions laid down by New Zealand shall regulate bills of lading wherever entered into in respect of vessels conveying goods to and from New Zealand.[2]

[1] See *Parl. Pap.*, Cd. 5135, pp. 72–83.

[2] This provision is clearly contrary to private international law, though it has the precedent of the Harter Act of the United States. The Australian Act No. 14 of 1904 only refers to bills of lading in respect of goods shipped from the Commonwealth, and so the Canadian Act in 1910 (c. 61), and the Western Australia *Sea Carriage of Goods Act*, No. 26 of 1909 (*Parl. Pap.*, Cd. 5135, pp. 50, 51), relate only to coasting trade in the state itself. See New Zealand *Parl. Pap.*, 1911, H. 15, p. 1.

In the case of the Commonwealth of Australia the Navigation Bill was recast in 1908, so as to correspond generally with the recommendations of the Navigation Conference of 1907. After further discussion with the Government of the Commonwealth, practically complete agreement was arrived at between the Imperial Government and the Commonwealth Government as to the terms of the Bill. The Bill, however, did not pass that year, and in 1909 it was not found possible to make substantial progress with it. It was reintroduced in 1910 and again in 1911.[1] Practically the only very important point in law in which it goes clearly beyond the recommendation of the Conference of 1907, as interpreted by the Imperial and the Commonwealth Governments, is a question as to the validity of certificates returned by the Board of Trade to officers of vessels after cancellation in Australia. The Bill of the Commonwealth proposes that such certificates should not be valid for use in Australia, while the Imperial Government in 1908 secured the agreement of the Commonwealth Government to a proposal that this provision should in accordance with the principles laid down at the Navigation Conference of 1907, be restricted to the case of vessels coasting in the Commonwealth or registered therein. The Bill insists on the survey of vessels in certain cases, and possibilities of international difficulties are contained in the clause requiring vessels to be unloaded by local workers.

There is a certain difference in the legislative powers of New Zealand and those of the Commonwealth of Australia with regard to merchant shipping. The power of New Zealand is limited by ss. 735 and 736 of the Imperial *Merchant Shipping Act* of 1894 to regulate the coasting trade and vessels registered in the Colonies.

In the view of His Majesty's Government, which rests on

[1] Commonwealth *Parliamentary Debates*, 1910, pp. 3717 seq., 3784 seq., 3881 seq., 3993 seq., 4173 seq., 4264 seq., 4307 seq., 4388 seq., 4503 seq. A memo was issued to Parliament showing the differences in the Bill from that proposed in 1908 and the points at issue with the Imperial Government. See also *Parl. Pap.*, 1909, Nos. 7 and 25; 1911, No. 11.

the highest legal authority, these sections accurately and exclusively define the powers of the New Zealand Parliament, subject to the remark that of course the Parliament of the Dominion can re-enact any provisions of the Imperial *Merchant Shipping Act*, and subject to the fact that, as has been noted above, by certain other sections of the Imperial *Merchant Shipping Act* special powers of legislation are given on certain matters to Dominion Parliaments.[1]

In the case of the Commonwealth of Australia these powers are undoubtedly possessed by the Commonwealth Parliament, but in addition s. 5 of the *Commonwealth of Australia Constitution Act*[2] provides that 'the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth'. The meaning of this clause would appear to be to extend the legislative powers of the Commonwealth with regard to merchant shipping not only to registered vessels and vessels engaged in the coasting trade, but to vessels even if not registered or engaged in the coasting trade, strictly speaking, if they fall within the ambit of the words of the section. Of course the section means much more than that, in that it puts the other laws of the Commonwealth in force on board these vessels, but with regard to merchant shipping its effect must be as stated.

The precise meaning of the clause has fortunately received judicial interpretation in the High Court of the Commonwealth in 1908 in the case of *The Merchant Service Guild of Australasia* v. *Archibald Currie and Company Proprietary, Limited*.[3] In that case a joint stock company registered in Victoria were owners of a line of ships registered in Melbourne

[1] *Parl. Pap.*, Cd. 4355, pp. 19, 20. [2] 63 & 64 Vict. c. 12.

[3] 5 C. L. R. 737. This supports Quick and Garran's view, *Constitution of Commonwealth*, p. 361. But it must be emphasized that it applies only to vessels which, wherever registered, have a real home in Australia. It seems reasonable, it may be added, that the power should exist and should be given to the other Dominions. See also Harrison Moore, *Commonwealth of Australia*,[2] pp. 74, 80, 261, 281; above, pp. 400, 401.

and engaged in trading between Australia, Calcutta, and South Africa. The officers of the company's ships resided in Australia and were engaged there, but the ships' articles were filled in and signed in Calcutta. The officers, though not entitled to be discharged in Australian ports, were allowed to leave at such ports if they wished, with the consent of the master. The ships did no inter-state trade, but occasionally made short trips from Calcutta to other Indian ports. The organization of employees to which the officers belonged filed a claim in the Commonwealth Court of Conciliation and Arbitration for the settlement of a dispute between the officers and their employers as to the wages, hours, and conditions of labour during the voyages of their ships. The matter came before the Commonwealth High Court on a special case stated by the President of the Commonwealth Court of Conciliation and Arbitration under s. 31 of the Commonwealth *Conciliation and Arbitration Act*, 1904. It was argued in favour of the Merchant Service Guild that s. 5 of the Constitution Act must be interpreted in a wide sense, so as to go beyond the powers conferred on the Commonwealth Parliament by ss. 735 and 736 of the Imperial *Merchant Shipping Act*, 1894.

It was also argued that the laws of the Commonwealth should be regarded as applying to disputes between the people of the Commonwealth, not only in Australia, but wherever the parties may be.

The Court rejected the arguments and decided in favour of the company. They held that in the case of the ships in question, even supposing that the port of departure was an Australian port, which was doubtful, it was impossible, as a matter of fact, to hold that the port of destination was also within the Commonwealth. 'The only interpretation,' said O'Connor J., 'which will give any effective operation to the section is to take the port of destination as meaning the port of final destination or last port of the voyage. The words of s. 5 would then be taken to describe a round voyage beginning and ending within the Commonwealth. That is the class of voyage to which in my opinion the section

was intended to apply.' The judge went on to point out that this interpretation was in accordance with the state of facts which must be taken to have been within the knowledge of the British Legislature at the time s. 5 was passed. It was known that a shipping trade carried on by ships owned and registered in Australia and manned and officered by Australian citizens had for many years existed in Australia and was rapidly increasing, and that it extended to New Zealand, the Pacific, and Indian ports. It was reasonable to impute to the British Legislature an intention to place the ships engaged on round voyages in such a trade in the same position as regards Australian laws as the ordinary British ship holds in regard to British laws, namely, that while on a voyage coming within the meaning of the section the Australian ship should be for the purposes of Commonwealth laws[1] a floating portion of Commonwealth territory. If the voyage were of that description it was immaterial to what part of the world it might extend. If it were a round voyage beginning at an Australian port, calling at Calcutta or any foreign port, and ending in an Australian port, the ship during the whole voyage would be under the Commonwealth laws and under the jurisdiction of the Commonwealth Courts. He held on the evidence that the voyages in which the ships in question were engaged were not such voyages.

The effect of this judgement is seen in the Navigation Bill of the Parliament of the Commonwealth of 1910, inasmuch as a new definition has been introduced in s. 5, namely: 'Australian trade-ship' includes every ship (other than a limited coast-trade ship, or river and bay ship) employed in trading or going between places in Australia, *and every ship employed in trading between* (*a*) Australia, and

[1] Such laws might be those regarding coloured races (s. 51, xxvi), or immigration and emigration (xxvii), influx of criminals (xxviii), external affairs (xxix), relations with islands of Pacific (xxx), trade and commerce with other countries and between the states (especially if extended to all trade and commerce as proposed in the Bill of 1910), naval and military defence (vi), lighthouses, &c. (vii), quarantine (ix), fisheries beyond territorial waters (x), census and statistics (xi), currency, coinage, and legal tender (xii), insurance (xiv), weights and measures (xv), &c.

(*b*) Territories under the authority of the Commonwealth, *New Zealand, or the Islands of the Pacific.* The words italicized represent the changes made in the section since 1908, when the Bill was first drafted in its present form. Similarly the definition of ' Foreign-going ship ' now reads—Foreign-going ship includes every ship (other than an Australian trade-ship) employed in trading or going between places in Australia and places beyond Australia.

In the case of New Zealand there have been decided by the High Court of New Zealand two cases of great importance, which no doubt influenced the Government of the Dominion in their action at the Conference of 1911. In the case of *In re Award of Wellington Cooks' and Stewards' Union*,[1] the issue was whether an award by the New Zealand Court of Arbitration as to the minimum rate of wages to be paid to cooks and stewards and seamen on vessels trading between New Zealand and Australia was binding upon two steamship companies, the first the Union Steamship Company of New Zealand, being registered in New Zealand, with the head offices and management in the Dominion, and the vessels affected registered there. The other company, the Huddart-Parker Company Proprietary, Limited, was a company registered in Victoria, where it had its head office and general management, and where its ships were registered. The articles of the Union Steamship Company's ships were signed in New Zealand, and the men were paid there, while those of the Huddart-Parker Company's vessels were signed in Australia, where also the men received their pay. It was found, as a matter of fact, that the awards made by the Arbitration Court were not observed in full by the companies, inasmuch as they called upon the employees in some of their vessels to do work which under the award should have been paid for as overtime, and which was not so paid for. This happened while the ships were in Australian or Fijian ports, or at sea, as well as when they were in New Zealand waters or harbours, and the Court of Arbitration sent a case for the

[1] (1906) 26 N. Z. L. R. 394. Cf. Harrison Moore, *Commonwealth of Australia*,[2] pp. 259, 266, 282, 283.

opinion of the Supreme Court as to the extent of the jurisdiction of that Court.

It was held by the Chief Justice [1] that the power given to the New Zealand Legislature by s. 53 of the *Constitution Act* of 1852 (15 & 16 Vict. c. 72) covered acts done beyond the territories of New Zealand. This was necessary, for otherwise the power given, which is to make laws for the peace, order, and good government of New Zealand, could not be effectively carried out. The Chief Justice said that the laws of New Zealand applied to persons on board a New Zealand ship as distinct from a British ship, even beyond the territorial limits of New Zealand. He admitted that the doctrine laid down in his judgement was a development of the doctrine of self-government, but he regarded it as part of the British Constitution to allow growth and development of powers, and that such a power had not hitherto been claimed under the provisions of the *Constitution Act* was no proof that the Act did not contain a potency of both legislation and administration not hitherto exercised in the Colony.

On these grounds he held that the award made by the Court of Arbitration bound New Zealand vessels even in Australia, and he also held that they did not bind Australian vessels, on the ground that the Arbitration Courts could not be assumed to deal with an Australian company or with Australian ships. It was possible for the Australian Parliament to legislate for those vessels, and the New Zealand Parliament had not, in his opinion, legislated in the Arbitration Act for foreign vessels owned by foreign owners, even if it had power to do so, and the Act could not be considered as referring to such vessels. He stated, however, that if the Huddart-Parker Company's vessels were to engage in purely coastal trade and make contracts in New Zealand with seamen and others on board their ships for labour in

[1] His judgement is certainly so expressed as to be very doubtful law. But all that was actually decided could equally well have been decided under s. 735 of the *Merchant Shipping Act*, 1894, which cannot be limited to territorial waters only, but must apply to registered vessels wherever they may be. For a criticism, see *Journ. Soc. Comp. Leg.*, ix. 208 seq.

coastal trade, then the arm of the New Zealand law was long enough to reach them.

It should be noted that at the Merchant Shipping Conference of 1907 no stress was laid upon this judgement by the Prime Minister of New Zealand, and the judgement has not passed without criticism. The Chief Justice has, however, in a recent case which is referred to below, re-asserted his conviction of the soundness of the judgement.

It will be observed that in that case the actual result of the judgement was to enforce New Zealand conditions only upon New Zealand registered vessels. But in a subsequent case the remark of the Chief Justice as to the powers of New Zealand with regard to the coastal trade was carried into effect with the result of conflict between an award of the High Court of the Commonwealth of Australia and the law of New Zealand. This case was that of *Huddart, Parker and Company Proprietary (Limited)* v. *Nixon*.[1]

In that case the plaintiff was a proprietary company incorporated under the State of Victoria and owning steamships which were registered in Melbourne, although the company had agents and offices in New Zealand. These steamships traded with New Zealand and were engaged in the coastal trade. The seamen and officers were engaged on articles signed in Melbourne or in Sydney, which were for six months and fixed the wages of the persons employed. The wages were paid by monthly advances at Melbourne or Sydney, according to the place of engagement. The wages in question were in some cases equal to or greater than the current rate of wages payable in New Zealand, but were in some cases less than the current rate of wages. The wages were fixed by an award of the Commonwealth Court of Conciliation and Arbitration, which was constituted by virtue of the Commonwealth *Conciliation and Arbitration Act*, 1904.

The Marine Department of the New Zealand Government claimed that while the ships were in New Zealand ports and while they were trading between two New Zealand ports, they were subject to the provisions of s. 75 of the *Shipping and*

[1] 29 N. Z. L. R. 657; see Keith, *Journ. Soc. Comp. Leg.*, xi. 294–9.

Seamen Act, 1908, of the Parliament of New Zealand. That Act provides that in the case of seamen engaged in New Zealand or engaged abroad but employed in New Zealand, the seamen while so employed shall be paid and may recover the current rate of wages for the time being ruling in New Zealand. It also provides (subsection 2) that the superintendent of the port, at which a ship loads or discharges cargo carried coastwise, shall notify the master of the ship of the provisions of the section, and the superintendent is empowered to have the ship's articles endorsed so as to show clearly the amount of wages payable. By the next subsection the Collector of Customs is authorized to detain the final clearance of the ship until he is satisfied that the crew has been paid the current rate of wages ruling in New Zealand, or any difference between the agreed rate of such wages and the New Zealand rate of wages. The company held that they were only obliged to pay the rate of wages provided for in the articles, and the questions submitted to the Court were whether s. 75 of the *Shipping and Seamen Act*, 1908, applied to the company's ships while in New Zealand ports, and while at sea between New Zealand ports; whether the Superintendent of Mercantile Marine had the right to endorse the articles of the company's ships as provided in subsection 2 of s. 75 of the Act, and whether seamen employed on the company's ships could sue in New Zealand for the current rate of wages ruling in New Zealand, notwithstanding that a different rate of wages was fixed by the ship's articles.

Though the opinions of the Court were somewhat divergent, it was decided by the Court that it was open to the seamen to claim the payment of the extra wages which represented the difference between the rates enforced by the Arbitration Court in the Commonwealth and the rates prevailing in the coastal trade of New Zealand, and that the refusal of a clearance was a legitimate means of enforcing the right of the sailors to those wages. The Court held that the provisions of the Shipping Act were invalid so far as they purported to confer upon seamen the right to sue for all their wages, as

in that case the Act came into conflict with s. 166 of the *Merchant Shipping Act*, 1894, which provides that when a seaman is engaged for a voyage or engagement which is to terminate in the United Kingdom, he shall not be entitled to sue in any Court abroad for his wages except on certain conditions[1] which had not been fulfilled in the cases in question. It was true that the case actually before the Court was not one of a voyage which was to terminate in the United Kingdom. But the Chief Justice held that as the Victorian Parliament had adopted similar provisions to s. 166 of the Act of the Imperial Parliament by Act No. 1557, the same respect should be paid to the Victorian Act as was paid to the Imperial Act, and he therefore held that the seamen could not claim for their wages, but only for the extra payment required under the legislation of New Zealand to make their wages up to the standard prevailing in the coasting trade.[2]

He also held that power to endorse the articles had been properly vested in the Superintendent of Mercantile Marine, and that the Collector of Customs could properly refuse a clearance of a vessel if the conditions as to payment had not been complied with.

Williams J. agreed with the Chief Justice ; it is not quite clear how far he held that s. 75 in purporting to give a seaman the right to sue for the wages specified in the articles was repugnant to s. 166 of the Imperial Act and to that extent void. Chapman J. agreed in substance with the Chief Justice and Williams J., but not on the grounds given by them for their decisions. He reconciled s. 166 of the Imperial Act with s. 75 of the New Zealand Act on the ground that the two sections dealt with totally different matters, and that therefore there was no repugnancy. The New Zealand

[1] i. e. the Court did not hold that the power given by s. 736 of the *Merchant Shipping Act*, 1894, extends to repealing a provision of the Imperial Act even as regards coasting vessels. But the judgement in effect gives the right to alter materially, and it is not easy to see why they did not allow repeal.

[2] The Court overlooked the fact that s. 264 of the Act of 1894 gives the Victorian enactment Imperial validity.

Act provided for an addition to the wages of the crew, to be enforced not by suit in the Courts but by the action of the Collector of Customs in refusing a clearance. So that so interpreted there was no real discrepancy between the Dominion and the Imperial Acts. On the other hand, Edwards J. held that s. 75 was *ultra vires* as conflicting with s. 166 of the Imperial Act, and that therefore a seaman was neither entitled to extra wages, nor could he sue for them, nor could the Collector of Customs refuse a clearance. He recognized that there was a difference between ships registered in Victoria and ships registered in the United Kingdom, and that, strictly speaking, the provisions of a New Zealand Act could not be repugnant to those of a Victorian Act, but he relied on the argument that if a distinction were made in the treatment of ships registered in the United Kingdom, and of ships registered in Victoria, the purpose of s. 736 of the Imperial Act, which requires that vessels should be treated alike wherever registered, would be defeated, and therefore that s. 75 must not be held to apply to vessels registered in Victoria. He called attention also to the unfairness of the position which would result from enforcing s. 75. In several cases the wages under the articles were greater than those payable in New Zealand, and yet the owners could not reduce the wages on that ground, whereas they were required to increase the wages in the cases in which they were not equal to those payable in New Zealand.

It is not exactly easy to follow the judgement of the majority of the Court. They were not apparently willing to claim that the power of regulating the coasting trade conferred upon the New Zealand Parliament by s. 736 of the Imperial Act of 1894 extended to altering a provision of the Imperial Act. On the other hand, they held that the New Zealand Parliament could completely alter the effect of the Imperial Act by changing the rate of wages of a seaman engaged for a voyage which was to terminate in the United Kingdom, by giving him a right to recover in the New Zealand Courts, or by the action of the New Zealand Marine Department, the difference between the wages

payable to him under the articles and the wages current at the time in the coasting trade of New Zealand.

It is difficult to see how direct repeal of a provision of an Imperial Statute differs substantially from the power claimed for the Dominion Parliament by the majority of the Court. It is clear that the intention of the section of the Imperial Act in question is that a seaman shall be entitled normally only to sue for wages in the United Kingdom, and the wages in question are clearly those stipulated for in his agreement. To give him the right to higher wages during a portion of his service, and to enable him to sue for the difference between his ordinary wages and the higher wages, is in everything but form to alter substantially the section of the Imperial Act. It is a difficult question why the majority of the Court were not content to hold that the power to regulate the coasting trade was sufficiently wide to enable the Parliament to repeal provisions of the Imperial Act which would otherwise normally apply. It may indeed be doubtful as a matter of history whether in giving in 1869 to Colonial Parliaments the power to regulate the coasting trade it was meant to do more than confer upon the Parliaments the right of opening or closing that trade to such vessels as they thought fit; but the Act must be read not with regard to the original intention of the clause, but to the effect of the wording, and the power to regulate the coasting trade as given in the Act of 1894 (s. 736) is so widely expressed that it seems clear that it must extend to repealing provisions of the Imperial Act which would otherwise be inconsistent with the local legislation.

If this were not the case the power to regulate the coasting trade which has been conceded by the Imperial Government as belonging to the Parliaments of the Dominions would become little more than meaningless, and it would seem simpler to place on the power of regulating a wider meaning than to accomplish the same result by ingenious efforts to reconcile the provisions of the Dominion and the Imperial legislation.

It must also be remarked that in the case in question the

provisions of the Imperial Statute had no application, for not only was the vessel in question registered in Victoria, but the seamen were not engaged for a voyage or engagement which was to terminate in the United Kingdom.

All the members of the Court appear to have acquiesced in the view that the Victorian Statute No. 1557, which adopted the provisions of the Imperial Act, 1894, including s. 166, was to be regarded in the light of a Colonial Statute. The Chief Justice merely said that as the vessels were registered and controlled by statute which the Imperial Legislature had authorized the State of Victoria to pass, they ought to have the same protection as British ships registered in England; apparently admitting that the Act had not, strictly speaking, the force of an Imperial Act, and this view was clearly expressed by Edwards J. If this were the case, then it is clear that the provisions of the New Zealand Act could not possibly be invalid, as there was nothing to which they could be repugnant except the law of another Colony. But as a matter of fact, the Court appears to have overlooked the fact that by s. 264 of the Imperial *Merchant Shipping Act* of 1894 the same effect as that of the Imperial Act itself is given to Acts passed by Legislatures of British Possessions which apply to British ships registered at, trading with, or being at another port in that possession, any provisions of part ii of the *Merchant Shipping Act* of 1894 which would not otherwise apply.

The Victoria Parliament by Act No. 1557 applied *mutatis mutandis* to ships registered in Victoria the provisions of part ii of that Act including s. 166, and it would appear therefore that as a result there is imported into the Imperial Act a provision to the effect that if a seaman is engaged for a voyage terminating in Victoria he shall not be entitled to sue abroad for his wages. There does not therefore appear to be any substantial difference between the case of vessels registered in the United Kingdom and vessels registered in a Colony, if that Colony has adopted under s. 264 the provisions of s. 166 of the Act of 1894.

It may also be noted that the Court did not discuss the

effect of s. 5 of the *Commonwealth of Australia Constitution Act*, 1900.[1] In that case the wages payable on board a ship were defined by an award of the Court of Conciliation and Arbitration of the Commonwealth of Australia established under a Commonwealth Act, and if the laws of the Commonwealth are by an Imperial Statute to be in force on vessels whose first port of clearance and whose port of destination are in the Commonwealth, it would appear that under an Imperial Act they are in force even in New Zealand waters in the case of Huddart, Parker & Company's steamers.

The question would arise then, whether the power given under s. 736 of the Imperial *Merchant Shipping Act*, 1894, is sufficiently extensive to enable the New Zealand Parliament to repeal a legislative provision, dealing indirectly with merchant shipping, which would otherwise apply to vessels which fall under s. 5 of the *Commonwealth of Australia Constitution Act*.

It seems hard to believe that such a power exists, and the New Zealand law can therefore only be reconciled with s. 5 of the Commonwealth Constitution Act on the reasoning adopted by Chapman J., viz. that the right given was quite a new one, and had nothing to do with the original right of the seaman to his wages. But this could be avoided in future by the Commonwealth providing that no addition to wages should be made while outside Australia on any ground.

But on whatever grounds the decision can be based it is perfectly clear that much confusion will inevitably arise in shipping matters unless some agreement can be come to between the various parts of the Empire as to uniformity of legislation.

The result of this judgement is that the owners of vessels which engage in the coasting trade of New Zealand, although they pay rates of wages fixed by the arbitration award in Australia, are nevertheless bound to pay extra wages in cases in which the coastal rates prevalent in New Zealand exceed the rates which are prevalent in the Australian trade;

[1] 63 & 64 Vict. c. 12.

but on the other hand, they cannot disobey the award of the Arbitration Court, and they therefore cannot pay lower wages in those cases in which the Australian rates of wages which are laid down in the award exceed those prevalent in the New Zealand coasting trade.

There is therefore a clear conflict between the position of New Zealand and Australian legislation, and the conflict will no doubt be still more marked when the Commonwealth of Australia legislates on the subject, for its Navigation Bill[1] contains clauses based on the Shipping Act of New Zealand, which provide for the payment of Australian rates of wages in the coasting trade, and therefore New Zealand vessels which engage in the coasting trade of the Commonwealth will be subject to the law of New Zealand, and also to the law of the Commonwealth, and there will no doubt be collision between those laws, just as there has been between the law of the Commonwealth and the law of New Zealand.

If it turns out, as seems to be the case, that the Australian Act would override the New Zealand law, even in New Zealand waters, it seems certain that New Zealand would naturally desire to obtain increased power for the regulation of merchant shipping, as it would obviously be awkward if New Zealand were compelled to conform to coasting conditions in Australia while the Australians could not legally be compelled to conform to coasting conditions in New Zealand.

It should be noted that in the discussion of the case of Huddart, Parker & Company,[2] the point was mentioned that it was very doubtful whether it would not be possible for the shipowners to make good the extra payment made in New Zealand by deduction from the wages earned outside New Zealand, so that the total amount paid would not

[1] ss. 286, 287, 290. Those provisions allow a seaman to sue for all his wages in Australia, and therefore, according to the New Zealand judgement, are *ultra vires pro tanto*, unless s. 5 of the Constitution Act covers the case, and clearly it would not do so in every case of coasting.

[2] 29 N. Z. L. R. 657.

exceed the amount provided for by the Australian Arbitration award. The Court did not express any opinion as to whether this would be legal or not. In the case of the Commonwealth of Australia it has been recognized that this is a great difficulty, and it is attempted to dispose of it by a section which reads as follows :—

(1) No provision in any agreement, whether made in or out of Australia, shall be taken to limit or prejudice the rights of any seaman under this part of this Act.

(2) Where, by reason of a seaman's being entitled to a higher rate of wages while the ship on which he serves is engaged in the coasting trade—

(*a*) any deduction is made from his wages earned out of Australia; or

(*b*) he is paid a lesser rate of wages outside Australia than is usual in voyages of a similar nature,—it shall be deemed that the seaman is not paid wages in accordance with this part of this Act while the ship is so engaged in the coasting trade.

Exactly to what extent this section will be upheld in the Courts it is difficult to say. The analogy of the *Peninsular and Oriental Steam Navigation Company* v. *Kingston*[1] has been quoted by the Government of the Commonwealth as justifying legislation of this character. The cases are analogous, but not precisely the same, and it is uncertain to what extent the Privy Council would follow their previous judgement if the matter came before them in a concrete instance.

The practical difficulty involved is the danger of the coasting trade of any Colony being appropriated by ships, the seamen on which are paid less wages than those which are paid in the coasting trade of the Dominion in question. But it would seem possible by agreement, at any rate between two such neighbouring Dominions as the Commonwealth and New Zealand, to obviate legislative interference with the ships of either Dominion.

It does not appear probable that the extension of the powers of Dominion Legislatures would by any means result

[1] [1903] A. C. 471.

in greater simplification of shipping matters. On the contrary, it would seem that further confusion would be inevitable if the powers of these Dominions are extended. What does seem desirable is that some agreement should be come to between the Commonwealth and New Zealand with regard to conditions of shipping, and if possible some agreement with the United Kingdom.

At present the existing legislative powers are tending to confusion and difficulty, and to add needlessly and without corresponding advantage to the problems of British shipping.

In addition to the Act No. 36 of 1909 to amend the existing legislation (consolidated in 1908), which only received the royal assent in 1911, the New Zealand Parliament passed in 1910 a Shipping and Seamen Amendment Bill, which the Governor reserved, and which makes important modifications in the existing law. By Clause 2 it is provided that the rate of wages prevailing in New Zealand shall be paid to all seamen on vessels plying or trading from New Zealand to the Commonwealth of Australia and from New Zealand to the Cook Islands. By s. 3 it is provided that an extra tax of 25 per cent. of the amount of passage money or freight shall be levied on passenger tickets, bills of lading, or shipping documents issued in respect of vessels trading from New Zealand to the Commonwealth or the Cook Islands, if the vessels carry any Asiatics as part of the crew. These taxes will not, however, apply if these vessels comply with the provisions of s. 2 of the Act, that is to say, if all the crew, including Asiatics, are paid the New Zealand rate of wages.

The Bill was introduced and passed very quickly through the Parliament without much discussion, in order to strengthen the hands of the Prime Minister at the Imperial Conference in 1911 in asking for extended powers for the Dominion in matters of merchant shipping.[1]

It was admitted by the Government in the course of the discussion that the legislation must be reserved for the royal assent, but it was contended that the legislation was similar in principle to that of the legislation of the Commonwealth,

[1] *Parl. Deb.*, cli. 839, 840; cliii. 695, 835, 836, 871.

which claimed the right to control the sea between Tasmania and any part of the Australian continent.

It was admitted by the Attorney-General in the Upper House that it might be possible to evade the provisions of s. 2, and it is clear that s. 3 was inserted in the Bill as a means of meeting evasions of s. 2. It is indeed obvious that the provisions of s. 2 may be evaded [1] by paying New Zealand rates while engaged in trading from New Zealand to Australia, but deducting from the total wages of the employees the excess rates so paid.

In the case of discharges in Australia it is proposed by the Dominion Government that the Australian Government should secure that the crews should be properly paid in accordance with New Zealand conditions, but in cases of discharges abroad it was admitted that the law could be evaded. On the other hand, the New Zealand Government would enforce for the benefit of Australia similar provisions made by Commonwealth legislation. How in every case this was to be done was not stated, and is by no means obvious.

It also appeared from the Debate that a main object of attack was the Peninsular and Oriental Steamship Company, which at present has a steamship service to New Zealand. These vessels, which trade from Australia to New Zealand, do not seem ever to do coasting trade in New Zealand (if they did it seems that they could avoid difficulties for the time being by turning their Lascars into passengers and running the ships with white crews, as is done by the Union Company when they employ Lascars), but merely engage in trade between Australia and New Zealand, and of course trade with the United Kingdom and elsewhere. They compete, it seems, effectively with the New Zealand Union line and the Australian Huddart-Parker line, and of course the rates of wages paid to Lascars, and in addition the conditions under which Lascars are carried, give them a real advantage in such competition.

[1] This might be prevented for British vessels by Imperial legislation; cf. the proposal of the Commonwealth at the Imperial Conference of 1911 in favour of legislation against conspiracy to evade the laws of one part of the Empire by the other parts; *Parl. Pap.*, Cd. 5513; 5745, pp. 244–6.

With regard to s. 2 of the Act it would probably be impossible to hold that it goes beyond the powers of the New Zealand Parliament so far as it is restricted to trade between New Zealand and the Cook Islands. The Cook Islands are a dependency of New Zealand, and there can be little doubt that trade with them is coasting trade which can be regulated at pleasure by the Dominion Parliament. This follows whatever view be taken of the effect of s. 736 of the *Merchant Shipping Act*, 1894. On the other hand, it is a very different matter when the regulation of the wages of vessels trading with the Commonwealth is concerned.

There is no real analogy between the relations of New Zealand and the Commonwealth and the relations of the continent of Australia and Tasmania. Tasmania is a part of Australia, and trade between the continent and Tasmania is unquestionably coasting trade. Similarly trade between New Zealand and the Cook Islands is coasting trade, but trade between New Zealand and the Commonwealth cannot possibly be so called.

Another mistake was made during the debate, in addition to the minor error of treating the Australian Navigation Bill as having been passed by the Parliament of the Commonwealth.

No notice was taken of the fact that the powers of the Commonwealth are under the Constitution different from those of the Parliament of the Dominion. As has been pointed out above, this fact was also overlooked by the Supreme Court of the Dominion, and it seems clear that the point, which is by no means unimportant, has escaped the notice of the legal advisers of the Government in the Dominion.

The proposed legislation would in the first place be *ultra vires* with regard to vessels which do not fall under the Commonwealth law. The Parliament of New Zealand has power to regulate the wages payable in the coasting trade, but it has no power to regulate wages payable otherwise than in the coasting trade.

If the Peninsular and Oriental Steamship Company engage in that trade they must pay coastal rates, but as long as they do not engage in that trade they cannot be forced to do so by New Zealand legislation. Strictly speaking, it is true New Zealand could legislate to provide that coastal rates should be paid while the vessel was within the three-mile limit, but such legislation would be of infinitesimal importance and if not repugnant, as it probably would be, to s. 166 of the Act of 1894, could be evaded by the company with the greatest possible ease.

Further, with regard to all ships whose first port of clearance and whose port of destination are in the Commonwealth, the Commonwealth law applies under s. 5 of the *Commonwealth of Australia Constitution Act*, 1900, and it does not seem that the New Zealand Parliament can override the Commonwealth law, which thus has Imperial validity.[1] Of course, if the term 'trading from New Zealand to the Commonwealth' is interpreted only to include vessels which are registered in New Zealand or in some sense are domiciled there, no conflict might arise, but it is very doubtful whether New Zealand does not intend to regard the Huddart-Parker vessels as falling within its sphere of activity.

More serious is the position with regard to s. 3 of the Bill, which is avowedly an attempt to exclude Asiatics from trading with New Zealand. It should, however, be noted that the attempt is not absolute; that is to say, that no attempt is made to interfere with vessels manned by Asiatics which merely trade with New Zealand or some other foreign country, or some British possession, and which do not trade from New Zealand to Australia or the Cook Islands. It should be noted further that the legislation cannot be said to be *ultra vires* the Dominion Parliament, and that it therefore does not stand on the same footing as s. 2, the objections to which are legal as well as political. The discrimination in s. 3 is directed by name against Asiatics, and is avowedly, by the admission of the Government in

[1] It may seem reasonable that New Zealand should be accorded like powers with the Commonwealth as to merchant shipping.

Parliament, directed against Asiatics. It forms, therefore, a direct contradiction to the policy which has been consistently adopted against such discriminations, and it is not to be wondered at that the Imperial Government, during the discussion at the Imperial Conference of 1911, found itself unable to undertake to secure the royal assent to the Bill, which therefore cannot take effect.[1]

[1] See *Parl. Pap.*, Cd. 5745, pp. 395 seq.; below, Part VIII, chap. iii. For the limitation of the Commonwealth power of legislation as regards purely state shipping, see *Owners of S.S. Kalibia* v. *Wilson*, 11 C. L. R. 689; above, pp. 868–71. For the saving of the validity of local navigation rules in harbours, &c., see 57 & 58 Vict. c. 60, s. 421; below, p. 1525, n. 2.

CHAPTER VIII

COPYRIGHT LEGISLATION

The Imperial *Copyright Act*, 1842, included provision in s. 17 that no person, except the proprietor of the copyright or a person authorized by him, should import into the United Kingdom, or any part of the British Dominions, any printed book first composed or printed and published in the United Kingdom wherein there is copyright, and reprinted in any country or place out of the British Dominions, on the penalty of the seizure of the reprint by the Customs and the forfeiture of a sum of £10 and double the value of each copy for each offence.

In the following year the Legislature of the Province of Canada passed a series of resolutions urging that the English *Copyright Act* had not increased the importation of English literature; that the exclusion of American reprints, even if possible, would be undesirable as confining the colonists to the study of American works, which would weaken their attachment to British institutions; that reprints were often sold, and that the law neither could be nor would be enforced. Nearly all the other Legislatures of the North American Provinces followed suit, and in 1845 the Legislature of Nova Scotia memorialized the Crown for a modification of the Act, basing their request on the same grounds as those suggested by the Canadian Legislature. The representations of the Legislatures received sympathetic consideration from the Imperial Government, as will be seen from Earl Grey's dispatch of November 5, 1846,[1] and after full consideration by Her Majesty's Government an Imperial Act was passed in 1847 (10 & 11 Vict. c. 95), which authorized Her Majesty to suspend

[1] *Parl. Pap.*, C. 7783, p. 17. See also *Provincial Legislation*, 1867–95, where much of the correspondence is reprinted, especially pp. 1281–1313; Quick and Garran, *Constitution of Commonwealth*, pp. 594 seq.

by Order in Council the provisions of the *Copyright Act* of 1842, or of any other Acts, prohibiting the importation of foreign reprints of British copyright works as to any Colonies in which the Legislature made due provision for securing and protecting the rights of British authors. Under this Act laws were passed by all the North American Colonies in the years 1845–1850, were assented to, and Orders in Council were issued, and the question for the time remained in abeyance. On the event of federation, the Provincial Legislation was replaced by a Canadian Act of 1868 (c. 56), which was confirmed by an Order in Council of July 7, 1868.

As a result of the legislation in question, reprints in America passed freely into Canada, but British copyright owners profited very little from the Act in question, as the duty actually collected on American reprints was extremely small. The Canadian publishers also complained that the effect of the Act of 1847 was to draw the whole of the business of providing cheap reprints into the hands of the United States publishers and printers.

In the year 1867, four of the provinces of Canada were united in the Dominion, and the *British North America Act*, 1867, s. 91 (23), specified copyright among the subjects which were to be within the exclusive legislative authority of the Parliament of Canada, as distinguished from the Legislatures of the Provinces. In the following year the Senate of Canada passed a resolution urging 'the justice and expediency of extending the privileges granted by the Act of 1847, so that, whenever reasonable provision and protection shall, in Her Majesty's opinion, be secured to the authors, Colonial reprints of British copyright works shall be placed on the same footing as foreign reprints in Canada, by which means British authors will be more effectually protected in their rights and a material benefit will be conferred on the printing industry of the Dominion'. This address was supported by the Finance Minister, who addressed a memorandum to the Secretary of State on July 1, 1868, in which he pointed out that the Canadian public were dependent for their supply of reprints on the United States, to the serious

injury of the British author, while if Canadian publishers were allowed to reprint they would supply not only their own markets but part of the United States markets, to the great advantage of the author, as the royalty could be more easily and more effectually collected than the import duty. This was followed in 1869 by a formal proposal that Canadian publishers should be allowed to reprint the works of English authors without their consent on paying a royalty of 12½ per cent. on the published price.

It was objected to this proposal by the Imperial Government, among other things, that it was doubtful whether the royalty would be collected better than the import duty had been; that the proposal would make English books cheaper in Canada than at home, thus making the British reader pay a monopoly price to let the Colonists have cheaper books; that if the plan were feasible it would no doubt have been adopted by arrangements between the author and the Canadian publishers, and that the Imperial Copyright Conventions with foreign nations would have to be denounced if the proposal were allowed.

The Canadian Government, however, did not accept the views of the Imperial Government, and they introduced and carried a Bill in 1872 which required reprinting in Canada within a month;[1] if this were not done licences might be issued to Canadian publishers to reprint on payment of a royalty of 12½ per cent., foreign reprints of such reprinted works being totally excluded. The Bill, which was reserved by the Governor-General, was vehemently opposed in England, and as a compromise the Imperial Government prepared a draft Bill which was sent in a circular dispatch to the Colonies on July 29, 1873. The Bill provided, in the case of books published in the Colonies, that they should be published in the United Kingdom within twenty days, and if this were not done the Judicial Committee of the Privy Council might issue a licence for their publication, and if not published in the United Kingdom within six months foreign reprints of books might be imported. In the case of books

[1] *Parl. Pap.*, H. C. 144, 1875, pp. 5–7.

not published in a manner suitable for circulation in a Colony, any person might apply to a Court for a licence to reprint on terms fixed by the Court, and if it were not reproduced in such convenient form within six months after first publication, foreign reprints might be introduced.

The Canadian Government, however, objected to the proposed Act on the ground of the procedure under it, and urged that the royal assent should be given to their own Act. Her Majesty's Government, however, were unable to accept this proposal, and owing to the unwillingness of Canada to accept the draft Imperial Bill it was not proceeded with, but Lord Carnarvon, then Secretary of State for the Colonies, expressed his readiness to co-operate with the Dominion Government and the confident hope that a measure could be devised which, while preserving the rights of the owners of copyright works under the Imperial Act, would give effect to the views of the Canadian Government and Parliament.

As a result of the discussion which followed upon Lord Carnarvon's assurance, the Canadian Parliament passed, in 1875, a *Copyright Act* (c. 88) giving power to any person domiciled either in Canada or in any part of the British Dominions or in any country having a copyright treaty with the United Kingdom, to obtain copyright in Canada for twenty-eight years with a second term of fourteen years, the condition for obtaining such copyright to be, that the book should be printed and published, or reprinted and republished in Canada. There was a saving in the Act for the importation of books lawfully printed in the United Kingdom. The Canadian copyright thus secured was, so far as it related to books first published in the United Kingdom, in addition to and concurrent with the copyright throughout the Queen's Dominions existing by virtue of the Imperial *Copyright Act* of 1842. The practical effect of the Canadian Act was to exclude during the term of Canadian copyright foreign reprints of such books, if they obtained the benefit of the special Canadian copyright by being published and printed in Canada. The Canadian Act was confirmed by the Imperial Act of 1875 (38 & 39 Vict. c. 53), as doubts had arisen whether the Canadian Act was

not repugnant to the Order in Council of 1868 for the admission of foreign reprints into Canada.

This Act is still in force in Canada as chapter 70 of the *Revised Statutes* of 1906.

The position as it stood after the passing of this Act in 1875 was that British authors possessed copyright in Canada under the Imperial Act of 1842; that the introduction of foreign reprints into Canada was regulated under the authority of the Imperial Act of 1847 by local legislation in the Dominion, and that copyright in works produced in Canada was granted for Canada by the Canadian Act of 1875. Foreign authors in certain cases (e. g. that of France) possessed copyrights in Canada by virtue of Orders in Council issued under Imperial *Copyright Acts* of 1844, 1852, and 1875. On the other hand, works first published in Canada did not enjoy copyright in the United Kingdom.

An important change took place in the position of the question of copyright in consequence of the International Convention signed at Berne on December 9, 1886, creating an International Union for the protection of literary and artistic works. The effect of the Convention was to secure to authors in any of the countries of the Union, or their lawful representatives in other countries of the Union, for their works, whether published in one of those countries or unpublished, the rights which the respective laws of those countries granted or might thereafter grant to natives. The enjoyment of these rights was to be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and was not to exceed in the other countries the term of protection granted in the country of origin. The Act was adopted by Order in Council of November 28, 1887.

This Convention was accepted by the Governments of Canada and the Australasian Colonies.

The treaty was the outcome of a Conference held at Berne in 1884 and 1885, and when early in 1886 it was decided to pass a Bill to enable the Convention to be accepted by Her Majesty's Government the Dominion Governments were

consulted and determined to accept the Convention, but in accepting the Convention Her Majesty's Government reserved to Her Majesty the power of announcing at any time the separate denunciation of the Convention by any of the self-governing Colonies.

The *International Copyright Act*, 1886, of the Imperial Parliament accordingly contains ss. 8 and 9, which provide as follows :—

8. (1) The *Copyright Acts* shall, subject to the provisions of this Act, apply to a literary or artistic work first produced in a British possession in like manner as they apply to a work first produced in the United Kingdom ;

Provided that—

(*a*) the enactments respecting the registry of the copyright in such work shall not apply if the law of such possession provides for the registration of such copyright ; and

(*b*) where such work is a book the delivery to any persons or body of persons of a copy of any such work shall not be required.

(2) Where a register of copyright in books is kept under the authority of the Government of a British possession, an extract from that register purporting to be certified as a true copy by the officer keeping it, and authenticated by the public seal of the British possession, or by the official seal or the signature of the Governor of a British possession, or of a Colonial Secretary, or of some secretary or minister administering a department of the Government of a British possession, shall be admissible in evidence of the contents of that register, and all Courts shall take judicial notice of every such seal or signature, and shall admit in evidence, without further proof, all documents authenticated by it.

(3) Where before the passing of this Act an Act or ordinance has been passed in any British possession respecting copyright in any literary or artistic works, Her Majesty in Council may make an Order modifying the *Copyright Acts* and this Act, so far as they apply to such British possession, and to literary and artistic works first produced therein, in such manner as to Her Majesty in Council seems expedient.

(4) Nothing in the *Copyright Acts* or this Act shall prevent the passing in a British possession of any Act or ordinance respecting the copyright within the limits of such possession of works first produced in that possession.

9. Where it appears to Her Majesty expedient that an

Order in Council under the *International Copyright Acts* made after the passing of this Act as respects any foreign country should not apply to any British possession, it shall be lawful for Her Majesty by the same or any other Order in Council to declare that such Order and the *International Copyright Acts* and this Act shall not, and the same shall not, apply to such British possession, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order; and the expressions in the said Acts relating to Her Majesty's dominions shall be construed accordingly; but save as provided by such declaration the said Acts and this Act shall apply to every British possession as if it were part of the United Kingdom.

It will be seen that these sections extend to the author of a literary or artistic work first produced in any Colony copyright throughout the Queen's Dominions, and that it preserves the power of any British possession to legislate respecting copyright within that possession of works first produced in that possession.

The effect of the Act, therefore, was that the author of a book first published in any part of the British Dominions had copyright in the book throughout the British Dominions for the term allowed by English law, and the author of a book first published in any foreign country belonging to the Copyright Union had copyright throughout the British Dominions for the same term or for any less term allowed by the law of the foreign country for copyright under that law. The Convention and the Act provided that the copyright is acquired automatically, so that any conditions as to printing or reprinting locally as a condition of obtaining copyright in a book first published in any country of the Copyright Union could not be imposed consistently with the Convention by any country which formed part of the Union.

In 1889 the Canadian Parliament passed an Act (c. 29) dealing with copyright which provided that copyright could be obtained by any person domiciled in any part of Canada or the British possessions or any citizen of any country which had an International Copyright Treaty with the United Kingdom in which Canada was included. The term of

copyright was to be twenty-eight years, and the condition for obtaining copyright was that the work should be, before publication or production elsewhere or simultaneously with the first publication or production elsewhere, registered in the office of the Canadian Minister of Agriculture, and that such work should be printed and published or produced in Canada, or reprinted and republished or reproduced in Canada within one month after publication or production elsewhere. If any person entitled to copyright did not take advantage of its provisions, any person domiciled in Canada might obtain from the Minister of Agriculture a licence to print and publish or to produce the work, and a licence was to be granted to any applicant who agreed to pay the author a royalty of 10 per cent. on the retail price of each copy or reproduction of the work. If a licence was issued under the Act, and evidence was adduced that the work was being printed and published or produced so as to meet the demands in Canada, the Governor-General might prohibit the importation of any copies of the work as long as the author's copyright was in force. It was expressly provided, however, that nothing in the Act should be deemed to prohibit the importation from the United Kingdom of copies of works of which the copyright was still existing, and which were lawfully printed and published there, and the Act was not to apply to works for which copyright had been obtained in the United Kingdom or other country within the International Union before the coming into force of the Act. The Act was not to come into operation until a day had been fixed by proclamation of the Governor-General.

The Governor-General forwarded the Act to the Secretary of State, together with a request from his ministers that steps should be taken to denounce the Convention of 1886 on behalf of the Dominion of Canada. The grounds on which the denunciation was asked for were that its provisions were not in accordance with those of the Canadian *Copyright Act* of 1889; that it was not in accordance with the requirements of Canada, and that it was a limitation of the privileges of Canadian publishers conferred by the Canadian *Copyright*

Act of 1875. It was pointed out in a long report,[1] the substance of which were the old objections which had been raised years before, that the Berne Convention had somewhat increased the causes of complaint which had formerly existed by giving foreign authors an automatic copyright in Canada. The benefit conferred on Canadian authors was comparatively small, and the proximity of the United States demanded that Canada should be treated in a different way from any other Dominion. The Government of Canada were satisfied that their proposals in the Act of 1889 were adequate in the interests of the author, and they were prepared to submit regulations to secure the collection of the royalty contemplated in the Act and its payment to the proper parties.

The Minister of Justice also argued as to the validity of the *Copyright Act* as passed. He contended that the Act was not inconsistent with any Imperial legislation passed since the adoption of the *British North America Act*, 1867, except, of course, the Imperial Act of 1886, which had been applied to Canada by Order in Council. He contended that the grant of power to legislate as to copyright by the *British North America Act* was a grant of power to repeal previous Imperial legislation applicable to Canada. He admitted that the view taken by the Imperial Law Officers in 1874 was that the grant of power in the *British North America Act* was merely a grant of power to the Dominion Parliament as opposed to the Provincial Legislatures, and that it gave no greater power to the Dominion than the Provincial Legislatures had hitherto enjoyed.

In replying on March 25, 1890, to the Governor-General's dispatch, Lord Knutsford intimated that he was unable to authorize the Governor-General to issue a proclamation to bring the Act of 1889 into force.[2] He stated that he was advised by the Law Officers that the *British North America Act* did not authorize the Dominion Parliament to amend or repeal, as far as relates to Canada, an Imperial Act conferring privileges within Canada. He pointed out that similar advice had been given by the Law Officers in 1871 and 1874,

[1] *Parl. Pap.*, C. 7783, pp. 4–9.

[2] Ibid., pp. 12, 13.

and in 1875, and that the advice was in harmony with the judgement of two judges in the case of *Smiles* v. *Belford*.[1] He also pointed out two provisions in the Act to which special exception was taken by the proprietors of copyright in England. In the first place, under the Canadian *Copyright Act* of 1875 no limitation of time for printing and publishing or reprinting and republishing in Canada was imposed, while the new Act allowed only one month, and in the great majority of cases it would practically be impossible to make the necessary arrangements within that time. Secondly, strong objection was felt to the provision empowering the grant of licences to print and publish works for which copyright might have been obtained. The Secretary of State admitted that the Royal Commissioners on Copyright in their Report of 1878 had recommended such grants ' in case no adequate provision were made by republication in the Colony or otherwise within a reasonable time after publication elsewhere for a supply of the work sufficient for general sale and circulation in the Colony ', but the conditions which in the view of the Commissioners seemed reasonable as conditions precedent to the granting of such licences had hardly had effect given to them in the Act. He added that it was not proposed to denounce the Convention of 1886 on behalf of Canada for the present, as Her Majesty's Government were not able to concur in the issue of a proclamation to bring the Act of 1889 into force. He suggested that it might be better to leave the law as it stood pending the determination of the question of legislation on copyright which was under consideration in the United States and any negotiations consequent thereon between Her Majesty's Government and the United States.

Negotiations with the United States eventuated in 1891[2] in the passing of an Act in the United States which provided for the grant of American copyright in a book to the author, being a citizen or subject of a foreign state or nation, on condition that two printed copies of the book printed from type set within the limits of the United States must be

[1] 1 O. A. R. 436.

[2] See *Parl. Pap.*, C. 6425.

delivered or deposited in accordance with the requirements of the Act on or before the publication of the book. S. 13 of the Act provided that the Act was only to apply to a citizen or subject of a foreign state or nation :

(*a*) If such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as to its own citizens ; or

(*b*) When such foreign state or nation is party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party to the agreement.

In reply to an inquiry from the United States Minister, Mr. Lincoln, the Marquess of Salisbury, on June 16, 1891, wrote as follows :—

Her Majesty's Government are advised that, under existing English law, an alien by first publication in any part of Her Majesty's dominions can obtain the benefit of English copyright, and that contemporaneous publication in a foreign country does not prevent the author from obtaining English copyright ;

That residence in some part of Her Majesty's dominions is not a necessary condition to an alien obtaining copyright under the English copyright law ; and

That the law of copyright in force in all British possessions permits to citizens of the United States of America the benefit of copyright on substantially the same basis as to British subjects.

On July 1, 1891, the President of the United States proclaimed that the first of the conditions specified in s. 13 of the Act of Congress was fulfilled in respect to the citizens or subjects of (amongst other countries) Great Britain.

The passing of the United States law and the grant of copyright to English authors in accordance with its terms were regarded in England as a matter of the greatest importance. On the other hand, the result with regard to Canada was, in the opinion of the Canadian Government, to increase the disadvantages of their position, inasmuch as, under the law of the United States, Canadian authors would obtain

copyright in the United States only on condition of setting up their works in type within the limits of that country, while an American author would automatically obtain copyright in Canada by publishing merely in the United Kingdom.

In view of the complicated position of affairs the Imperial Government appointed a Departmental Committee representing the Colonial Office, the Foreign Office, the Board of Trade, and the Office of the Parliamentary Counsel, to consider the Canadian *Copyright Act* of 1889. In their report[1] the Committee pointed out that the Canadian Act was inconsistent with the Berne Convention, as the Canadian Government recognized, and that if Canada withdrew from the Berne Convention the Act of 1886 would also cease to apply to Canada, and Canadian authors would cease to have copyright in the United Kingdom or in any other part of the British Dominions except Canada; and the author of a book first published in any other part of the British Dominions (except the United Kingdom) or in any foreign country belonging to the Copyright Union would cease to have copyright in Canada. They recognized that if Canada pressed for withdrawal from the Union her request could not well be refused, but this step would be a matter for much regret, since it would strike a serious blow at the policy of International and Imperial copyright, and would be a retrograde measure that would condemn Canada to a policy of isolation and of antagonism to the communities of civilized states which had become parties to the Treaty of Berne. Moreover, the withdrawal of Canada from the terms of the Act would seriously affect, for example, Australian authors.

The Committee considered that the Canadian legislation was, to some extent, hardly consistent with the assurance given by Her Majesty's Government to the Government of the United States of America. They suggested that the Canadian Act of 1875 was no longer necessary and might be withdrawn. The Imperial Act of 1886 gave copyright to books first published in any part of the Queen's Dominions, and the Act of 1875 was no longer, therefore, essential.

[1] *Parl. Pap.*, C. 7783, pp. 43–56.

The Committee held that the Canadian Act of 1889 was inconsistent with Imperial legislation and would therefore require to be confirmed by an Imperial Act, but they were not prepared to recommend that it should be so confirmed in its present form. They urged that a Bill for the purpose could hardly be passed through the Imperial Parliament, as it would be inconsistent with the policy of making copyright independent of the place of printing, which Her Majesty's Government had for many years been urging the United States to adopt; it would impair the rights in Canada of British authors, by whom the Canadian market was principally supplied, and it would be at least open to the charge of being inconsistent with the declaration made in 1891 to the United States, on the faith of which the United States had admitted British authors to the benefit of their copyright law.

The Committee considered that the Canadian reader had no grounds for complaint under the existing arrangements, as it could not matter to him, as a reader, whether the reprints which he used were produced in Canada or in the United States. Canadian authors could only suffer from the isolation of Canada in copyright matters. No doubt the Canadian publishers and printers felt severely the competition of rivals in the United States, but it was doubtful whether the Berne Convention had augmented the difficulties, for even before the Convention countries like France, which had copyright treaties with the United Kingdom, were entitled under those treaties and the *International Copyright Acts* to copyright in Canada. The arrangement with the United States was not such as to increase the inducement to American publishers to reprint British books, and the real grievance of the Canadian publishers was that they were undersold by competitors who had the advantage of a larger capital and a larger market, and in whose favour protective legislation was enforced against their weaker rivals.

The Committee recognized that the present state of the Canadian law was unsatisfactory, and they suggested that on proof of a book first published in the United Kingdom and by such publication having copyright in Canada not being

produced within a reasonable time either in the United Kingdom or in Canada at such a price as to meet the Canadian demand, there should be power to grant a licence for its publication in Canada on the terms of paying a royalty to the copyright authors. But more precautions should be taken than was done by the Act of 1889 to secure the interests of authors. Twelve months might be allowed as a reasonable time for cheap reproduction, and during this period the Imperial Copyright should remain unimpaired. The amount of the royalty might, perhaps, be 15 per cent., and should be levied by means of a stamp on each copy, and if unstamped books were offered for sale they should be liable to seizure. If this were done and licences could be granted for reprinting British copyright books, either the foreign reprints Act of 1847 should cease to apply to Canada or Canada should, in accordance with the recommendations of the Copyright Commission, make better provision for securing to the authors of copyright works the payment of duty on such foreign reprints as should be still admitted into the Colony.

The report of this Committee was transmitted to the Government of Canada in a dispatch of June 30, 1892, with a request that the whole subject should be reconsidered by the Dominion Government in the light thrown upon it by the researches of the Committee.[1] The reply[2] to this dispatch was sent by Lord Aberdeen on February 10, 1894, in which it was stated that nothing in the Report was likely to change the opinion of the Canadian Ministry, that notice should be given with the least possible delay of the withdrawal of Canada from the Berne Convention. The Ministry reminded the Governor-General that Canada had been repeatedly assured that her continuance in any treaty arrangement of this kind would be subject to her desire to withdraw at any time on giving the required notice. In a later dispatch of February 20, 1894,[3] a detailed reply was given to the report of the Departmental Committee. The

[1] *Parl. Pap.*, C. 7783, p. 60. [2] Ibid., p. 64.
[3] Ibid., pp. 66–77.

Minister of Justice emphasized the fact that the Parliament of Canada was strongly in favour of the policy of the Canadian Government. He urged that the arrangement made with the United States was merely a statement by the Foreign Secretary of the existing law of copyright in the Empire, and was not an undertaking that that law would never be altered. It was pointed out that the result of the arrangement was that Canada had become more than ever a market for American reprints, to the detriment of publishers in Canada. There was not the slightest prospect of the United States altering their fixed policy of insisting on reprinting in that country. Moreover, was it intended that the rights of British copyright holders were to continue to be set up as a bar to the rights of the Canadian people and the Canadian Parliament, when it had been repeatedly recognized that the existence of that privilege had become a grievance in Canada and assurances had been given that the grievances would be redressed ? The Minister of Justice was unable to agree with the views of the Committee as to the position of Canadian readers and authors, and he could not accept the practical suggestions made by the Committee for the granting of licences on the conditions laid down by them. He declined, moreover, to discuss the constitutional right of Canada to pass the Act of 1889, regarding it as beyond doubt.

In a further dispatch of March 30, 1894,[1] Lord Aberdeen forwarded a minute from his ministers stating that it was no longer intended to collect the duty of $12\frac{1}{2}$ per cent. imposed on foreign reprints of British copyright works for the benefit of copyright holders, in view of the changes which were expected to be made in the Imperial Copyright Laws in so far as they apply to Canada. In reply to this dispatch [2] the Governor-General was asked whether his ministers had considered what would be the effect [3] of the second section of

[1] *Parl. Pap.*, C. 7783, p. 78. [2] Ibid., p. 81.

[3] This referred to the fact that on the lapsing of the duty the Order in Council of July 7, 1868, suspending the operation of the Imperial Act of 1842, ceased to have effect, and the importation of foreign reprints into Canada was legally impossible. See below, pp. 1233, 1234.

the *Colonial Laws Validity Act*, 1865, upon the proposal, but that inquiry was not answered.

The situation, however, became less acute after the death of the Minister of Justice, Sir John Thompson, who had pressed the question on the constitutional ground.

In 1900 a compromise was effected and the assent of the Crown was given to an amending Act passed by the Canadian Parliament (63 & 64 Vict. c. 25). This Act provides that if a book as to which there is subsisting copyright under the Canadian legislation has been first lawfully published in any part of the British Dominions other than Canada, and if it is proved to the satisfaction of the Minister of Agriculture that the owner of the copyright so subsisting and of the copyright acquired by such publication has granted a licence to reproduce in Canada an edition or editions of such book designed for sale in Canada, the Minister may prohibit the importation into Canada of any copies of the book printed elsewhere. The Act is still in force as part of c. 70.

In the meantime the question of consolidating the Imperial Copyright Law became more and more pressing. An additional Convention was signed at Paris in 1896, and several attempts were made on behalf of the representatives of authors in the United Kingdom to obtain the concurrence of Canada in Imperial legislation on the subject. Mr. Hall Caine visited Canada in 1895 and Mr. Thring paid it a visit in 1899, but in neither case was any final result obtained, although the views of British authors were very fully represented to the Government of Canada, which gave them a sympathetic hearing, and Mr. Mills discussed the whole question with Mr. Chamberlain in 1901.

Bills to consolidate the Copyright Law were introduced into the Imperial Parliament by private members in 1898, 1899, and 1900, but none of these Bills passed. Shortly after, the question of the constitutional position of Canada with regard to copyright was raised, but not settled, in the Courts.[1] The Imperial Book Company of Toronto imported into Canada reprints of the *Encyclopaedia Britannica*, ninth edition, and

[1] 21 T. L. R. 540.

Messrs. Adam & Charles Black and the Clark Company, Limited, brought an action against them on September 18, 1901, in the High Court of Ontario, claiming that they were infringing their copyright in the work by importing into Canada reprints of the *Encyclopaedia Britannica* printed in the United States. It was urged on behalf of the Imperial Book Company that there was no sufficient registration of the work at Stationers' Hall, and that the notice in writing required by s. 152 of the Imperial *Customs Consolidation Act*, 1876, to be given to the Commissioners of Customs in Canada when an author desired to secure that reprints of his work should not be imported, had not been correctly given. They also contended that, since the passing of the *British North America Act*, 1867, the Parliament of Canada had had authority to legislate for Canada in regard to copyright and to override the Imperial Acts prior to 1867, and that the respondents had not complied with the requirement of the Canadian Statutes, and that accordingly they were not entitled to relief.

The action was tried at Toronto on September 3, 1902, by Mr. Justice Street, who dismissed the claim with costs, on the ground that the notice given by the plaintiff to the Commissioners of Customs under s. 152 of the *Customs Consolidation Act*, 1876, was defective in that the date of the expiration of the copyright was incorrectly stated. The plaintiff, however, subsequently obtained leave to re-argue the case, and on January 26, 1903, Mr. Justice Street delivered a second judgement,[1] giving judgement in favour of the plaintiff, restraining the Imperial Book Company from importing and selling the *Encyclopaedia*, and directing the delivery up of unsold copies and an account of profits. In his judgement Mr. Justice Street decided that s. 152 of the Imperial *Customs Consolidation Act*, 1876, had never been in force in Canada because of s. 151 of the same Act, which provided that the Imperial Customs Act should extend to and be of full force in the several British possessions abroad except when any possession had made entire provision for

[1] 5 O. R. 184.

the management and regulation of its Customs. As Canada had done this, s. 152 could not apply to it.

On the other hand, he held that s. 17 of the Imperial *Copyright Act*, 1842, which prohibits any person, not being the proprietor of the copyright or some person authorized by him, from importing into any part of the British dominions any book first composed or written or printed and published in any part of the United Kingdom and reprinted in any country or place wheresoever out of the British dominions, was in force in Canada.

From Mr. Justice Street's second judgement the petitioners appealed to the Court of Appeal for Ontario and the appeal was dismissed by a majority.[1] The petitioners next appealed to the Supreme Court of Canada, which unanimously, on January 31, 1905, dismissed the appeal with costs.[2] Mr. Justice Sedgewick, in delivering judgement, said :—

> We are unanimously of opinion that the conclusion at which the majority of the Court of Appeal arrived is the correct one and that the appeal should be dismissed with costs. In so deciding, however, we wish to state that we express no opinion one way or the other upon the question as to whether *Smiles* v. *Belford* was rightly decided.

The defendants asked the Privy Council for special leave to appeal, on the grounds that the decision of the Canadian Court that s. 152 of the *Customs Consolidation Act*, 1876, was not in force in Canada was wrong and should be reversed, or if that decision were correct, s. 17 of the Imperial *Copyright Act*, 1842, had been repealed by Canadian legislation. The Privy Council, however, declined to grant special leave to appeal, and it may therefore be assumed that they regarded the decision as substantially correct.

It will be seen that the judgement in this case assumes that the Order in Council which was made under the Imperial Act of 1847, and under which the prohibition of the importation of foreign reprints into Canada was suspended so long as provision was made by Canadian legislation for the levying

[1] 8 O. A. R. 9.

[2] *Imperial Book Co.* v. *Black*, 35 S. C. R. 488.

of a duty on the reprints for the benefit of English Copyright owners, had ceased to have effect when the Canadian Parliament repealed the section of their Customs Act imposing the duty, and that therefore s. 17 of the Imperial Act of 1842 still remains in force in Canada.

This case leaves it still doubtful whether or not the Canadian Courts would hold in a suitable case that the power of legislation given by the *British North America Act*, 1867, with regard to copyright, is sufficient to override the terms of an Imperial Act prior to that date and applying to the Dominion.

It should be noted that the Imperial protection for works of art is probably limited to the United Kingdom. It has been decided as to paintings, drawings, and photographs in the case of *Graves* v. *Gorrie*[1] that the *Fine Arts Copyright Act* does not apply beyond the United Kingdom. The same rule would probably apply to works of engraving and sculpture, so that the only provision that is made for them beyond the United Kingdom is that made by Colonial Law. On the other hand, any literary or artistic work first produced in a British possession obtains copyright in the United Kingdom under s. 8 of the *International Copyright Act*, 1886.

A new importance was given to the matter by the revision of the International Copyright Convention, carried out by the International Conference held at Berlin in October and November 1908.

The revised Convention, which was signed *ad referendum* by the British delegates on behalf of His Majesty's Government, embodied certain alterations which could not be put into force in the British Empire without a change in the existing law. The revised Convention was examined, from the point of view of the interests of the United Kingdom, by a strong Departmental Committee, presided over by Lord Gorell, which reported in December 1909 substantially in favour of the ratification of the Convention.[2] Before, however, any action could be taken to carry out the recommenda-

[1] [1903] A. C. 496.

[2] See *Parl. Pap.*, Cd. 4976, 5051.

tions of the Committee it was necessary to ascertain the views of the other parts of the Empire.

A Conference of representatives of all the self-governing Dominions, convened as a subsidiary Conference of the Imperial Conference, and comprising also a representative of the India Office, accordingly met to consider in what manner the existing uniformity of the law on copyright could best be maintained, and in what respects the existing law should be modified, the basis for discussion being the revised Copyright Convention.

The following resolutions were arrived at as to an Imperial Copyright Law :—

2.—(*a*) The Conference recognizes the urgent need of a new and uniform law of copyright throughout the Empire, and recommends that an Act dealing with all the essentials of Imperial Copyright Law should be passed by the Imperial Parliament, and that this Act, except such of its provisions as are expressly restricted to the United Kingdom, should be expressed to extend to all the British possessions : Provided that the Act shall not extend to a self-governing Dominion unless declared by the Legislature of that Dominion to be in force therein, either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies as may be enacted by such Legislature.

(*b*) Any self-governing Dominion which adopts the new Act should be at liberty subsequently to withdraw from the Act, and for that purpose to repeal it so far as it is operative in that Dominion, subject always to treaty obligations and respect for existing rights.

(*c*) Where a self-governing Dominion has passed legislation substantially identical with the new Imperial Act, except for the omission of any provisions which are expressly restricted to the United Kingdom, or for such modifications as are verbal only, or are necessary to adapt the Act to the circumstances of the Dominion, or relate exclusively to procedure or remedies or to works first published within or the authors whereof are resident in the Dominion, the Dominion should, for the purposes of the rights conferred by the Act, be treated as if it were a Dominion to which the Act extends.

(*d*) A self-governing Dominion which neither adopts the

Imperial Act nor passes substantially identical legislation, should not enjoy in other parts of the Empire any rights except such as may be conferred by Order in Council, or, within a self-governing Dominion, by Order of the Governor in Council.

(*e*) The Legislature of any British possession (whether a self-governing Dominion or not) to which the new Imperial Act extends, should have power to modify or add to any of its provisions in its application to the Possession; but, except so far as such modifications and additions relate to procedure and remedies, they should apply only to works the authors whereof are resident in the Possession and to works first published therein.

Repeal of existing Copyright Acts

3. The Conference is of opinion that as from the date on which the new Imperial Act takes effect, the existing Imperial Copyright Acts should be repealed so far as regards the parts of the Empire to which the new Act extends. In any self-governing Dominion to which the new Imperial Act does not extend the existing Imperial Acts should, so far as they are operative in that Dominion, continue in force until repealed by the Legislature of that Dominion.

International Copyright

4.—(*a*) The Conference is of opinion that, save in so far as it may be extended by Orders in Council, copyright under the new Imperial Act should subsist only in works of which the author is a British subject, or is bona fide resident in one of the parts of the British Empire to which the Act extends; and that copyright should cease if the work be first published elsewhere than in such parts of the Empire.

(*b*) The Conference is of opinion that, if possible, it should be made clear on ratification that the obligations imposed by the Convention on the British Empire should relate solely to works the authors of which are subjects or citizens of a country of the Union, or bona fide resident therein; and that in any case it is essential that the above reservation should be made in regard to any self-governing Dominion which so desires.

5. His Majesty should have power to direct by Order in Council that the benefits of the new Imperial Act, or any part thereof, shall be granted, with or without conditions, to the works of authors, being subjects or citizens of or residents

in a foreign country, and to works first published in that country, conditionally on the foreign country in question making proper provision for the protection of British subjects entitled to copyright: provided that Orders granting the benefits of the Act to a foreign country within any self-governing Dominion should be made by the Governor in Council of that Dominion.

A Bill to effect this result was introduced into the House of Commons in 1911, was extensively amended and sent to the Lords, but the principle of colonial autonomy was respected. Meanwhile a Canadian Bill was allowed to stand over in 1911 for the passing of the Imperial Act.[1]

[1] See *Parl. Pap.*, Cd. 5272. In the other Colonies copyright legislation deals only with works first published there, as it is of course open to any legislature to do; see the Australian Act, No. 25 of 1905; New Zealand Act, No. 29, 1908. In Newfoundland an Act of 1888 (c. 20) was refused the royal assent as being passed in too wide terms, but an Act of 1890 (c. 19) became law (*Provincial Legislation*, 1867–95, p. 1290). See *Consol. Stat.*, 1892, cc. 110, 111. The Union will no doubt legislate after the Imperial Act is passed.

CHAPTER IX

DIVORCE AND STATUS

Questions of marriage degrees and of divorce have arisen chiefly in the case of the Australian Colonies, probably because there only has there been no body of opinion sufficiently strong to prevent the matter becoming the subject of advanced legislation. Such legislation was rendered impossible once and for all in Canada since 1867, and the date of admission of the Provinces of British Columbia and Prince Edward Island, by the transfer to the Dominion of the sole power of legislating upon this topic, and the existence of the Roman Catholic population of Quebec and elsewhere in the Dominion. Newfoundland, with a large Catholic population, is in like case. In Victoria a Bill to amend the law of divorce was not assented to in 1860, but the measure became law in 1864.[1] In 1877 and 1879 Bills as to divorce reserved in New South Wales were not assented to, but an Act of 1881 (No. 31) became law. In 1887 a still more important Bill came forward from that Colony. The Bill did not receive the royal assent, but the dispatch of January 27, 1888,[2] which intimated that it had not been found possible for the time being to advise the issue of an Order in Council confirming the Act, laid down certain matters as suitable for further discussion in the Colony before a final decision as to the Act was arrived at. The first matter mentioned in that dispatch was the smallness of the majority by which the Bill had passed one of the Houses of Parliament, the Legislative Council; this was thought to show that the measure might not be really wanted by the people, and that further consideration might be desired. The second observation was that the measure would be very

[1] *Parl. Pap.*, H. C. 196, 1894, pp. 8, 9.

[2] Summarized in *Parl. Pap.*, C. 6006. See also Dilke, *Problems of Greater Britain*, ii. 282, p. 7; and for the laws, *Parl. Pap.*, H. C. 144, 145, 1894; Cd. 1785; New South Wales *Debates*, xxv. 260, 1079, 1605; Victoria, lxii. 314, 827.

inconvenient if it were to be adopted as law in one part of Australia only, and thus cause one Colony to have more simple divorce laws than any of the rest; and the third laid it down that the basis of divorce should be domicile, otherwise there would be the hopeless result that in various parts of the Empire there would be persons who were in some places lawfully married, in others not, and the matter was still worse if second marriages were formed by divorced persons.[1]

In 1890, however, the Victorian Act of 1889 regarding divorce was accorded the royal assent by Order in Council of March 21. The causes laid down for divorce were habitual drunkenness coupled with failure to support for three years, or with cruelty on the husband's part, or drunkenness with neglect of domestic duties on the wife's part, or desertion for three years; and after three years' imprisonment a petition could be presented if the respondent had still a commuted sentence for a capital crime to face, or a sentence of at least seven years' penal servitude; a petition was possible if within the preceding year the respondent had murderously assaulted the petitioner, and in the case of the wife because of adultery either in the conjugal residence or coupled with circumstances of aggravation or of a repeated act of adultery: of all these new causes of divorce there was only one, the last, which was then law in Australia, being that adopted in the New South Wales Act of 1881. These causes of divorce were only open to persons *bona fide* domiciled in the Colony for two years and upwards before the bringing of the petition, but for the purposes of the word domicile a deserted wife who was domiciled in the Colony at the time of her desertion was included, and such a wife was to be deemed to retain her Victorian domicile notwithstanding a change of domicile on the part of her husband. But no persons should be entitled to petition for divorce who had resorted to the Colony for that purpose only.[2]

[1] Cf. Quick and Garran, *Constitution of Commonwealth*, p. 610. Clark, *Australian Constitutional Law*, pp. 98, 99, held that under s. 118 of the Constitution a divorce in one state is valid in every other, but this is not sound law, for the contrary has now been held in the United States.

[2] Act No. 1166, s. 74.

The Secretary of State approved the Bill in a dispatch of February 20, 1890. He pointed out that in this case, as distinct from the New South Wales case, the Bill was passed after a general election at which the Bill had been brought prominently before some of the constituencies, and that its general acceptance throughout Australia was shown by similar Bills brought into the Parliaments of New South Wales and South Australia, and by the action of all the Australian Agents-General, who had called upon him and made representations to him of the will of the people of Australia. The third condition mentioned in the New South Wales dispatch was fulfilled by the adoption of the principle of domicile, and he laid stress on the fact that he understood from the Agents-General that the addition of the words 'for two years or upwards', was not intended to limit the effect of the word domicile, but merely to require the further condition that the domicile was *bona fide* domicile.

The New South Wales Parliament accordingly re-enacted the Bill of 1887 with amendments, and it became law as No. 37 of 1892, and since then the Colonies of Australia have freely legislated on the subject of divorce on the principles laid down, viz. the adoption of divorce as resting on domicile, with, however, the exception of the deserted wife,[1] and giving divorce for such causes as they deem desirable without reference to the backward condition of English law on the topic. But Queensland, South and Western Australia, and Tasmania still follow the English law.

It is, however, somewhat doubtful if the harmony of legislation is any longer maintained. The New South Wales Act No. 14 of 1899 presents a curious series of alternative possibilities: any husband may petition under s. 12 in the

[1] This principle also applies in Natal under Law No. 18 of 1891; see *Thomas* v. *Thomas*, 23 N. L. R. 38; *Wright* v. *Wright*, 27 N. L. R. 651; *Sandberg* v. *Sandberg*, 27 N. L. R. 684. Otherwise the Natal rule is strict; see *Steer* v. *Steer*, 16 N. L. R. 237; *Friedman* v. *Friedman*, 23 N. L. R. 25; *Lea* v. *Lea*, ibid., 91; *Etheridge* v. *Etheridge*, ibid., 180; *Laughlen* v. *Laughlen*, 26 N. L. R. 230. Contra, *Thurgood* v. *Thurgood*, 17 N. L. R. 49, and cf. *Mason* v. *Mason*, 4 E. D. C. 330, where a vagabundus is declared unable to change his wife's domicile.

case of adultery by his wife ; by s. 13 any husband who has been domiciled in New South Wales for three years can obtain divorce on certain grounds similar to those mentioned in the case of the Victorian Act of 1889. In this case the distinction might be between any husband domiciled and any husband domiciled for three years, though there is reason to think, and the head-notes to the sections adopt the view, that the term ' any husband ' is meant to cover any and every case. But the reading of ss. 14–16 is decisive ; for the distinction there is between any wife, and any wife whose husband is domiciled in New South Wales, and any wife domiciled in the Colony at the institution of the suit for three years, always provided that she did not resort thither to obtain a divorce. It is also provided that no wife who was domiciled in the Colony when the desertion commenced shall be deemed to have lost her domicile by reason of her husband having obtained a foreign domicile since he deserted her. In the case of New Zealand divorce jurisdiction is given in case of domicile for two years, with the usual saving of a married woman whose domicile is changed by her husband's action after desertion, but in addition any wife may claim under s. 23 of the Act No. 18 of 1904 on certain grounds, and it is again doubtful whether the term is to mean any wife domiciled, or any wife whatever. Another provision in that Act may be mentioned as having in effect introduced divorce by consent into New Zealand ; the law, as amended in 1898, allowed the failure to obey an order for the restitution of conjugal rights to serve as the basis of a divorce for desertion ; accordingly, by collusion two parties could bring about the granting of a suit for restitution, and they then could proceed to petition on the grounds of desertion ; this led in 1907 to the passing of an amending Act (No. 78) to remove the difficulty, which was felt to be very undesirable.[1] In Papua an Ordinance of 1910 regulates divorce ; it follows the lines of the Imperial Act of 1857, and it would no doubt

[1] See New Zealand *Parliamentary Debates*, 1907, cxlii. 845 seq., 926 seq., 968 seq. The same abuse is possible under New South Wales Act No. 14 of 1899, s. 11.

be held by the Commonwealth High Court to be applicable only to domiciled persons.[1]

The position adopted by the Courts in the United Kingdom now appears to be definitely based on the view that domicile is essential as a basis of divorce jurisdiction. The case of the compulsory and artificial change of domicile through desertion has been considered, and it seems that judicial opinion is definitely against admitting even this exception to the general rule. In the case of *Deek* v. *Deek*[2] the Court was apparently in favour of the exercise of jurisdiction in this case, and in *Armytage* v. *Armytage*[3] in 1898, the President of the Probate, Admiralty, and Divorce Division, expressed the opinion in favour of the exercise of jurisdiction in such cases. But since that date judicial opinion, with some hesitation, seems to have gone the other way.[4]

On the other hand, it is certain that not only by law, as laid down in the Acts referred to, have Colonial Parliaments claimed a right to grant divorce in certain cases without domicile, but what they have claimed in the case of a deserted wife is actually what had been asserted in several cases to be law independently of any legal enactment.

It was so decided in the case of *Ryley* v. *Ryley*[5] in New Zealand, and in the Victoria case of *Hoamie* v. *Hoamie*[6] it was held that the Court of Victoria had jurisdiction to dissolve a marriage celebrated in Victoria between a woman there domiciled and a foreigner who had not abandoned his domicile of origin, even though the foreigner might be resident and domiciled in his own country at the commencement of the suit. Apparently in *Ripper* v. *Ripper* the West

[1] *Parker* v. *Parker*, 5 C. L. R. 691, affirming 7 S. R. (N. S. W.) 384.

[2] 2 Sw. & Tr. 90.

[3] [1898] P. 178.

[4] Dicey, *Conflict of Laws*,[2] pp. 261–4, however, supports the view that it is allowable in the light of recent English decisions; see *Le Mesurier* v. *Le Mesurier* [1895], A. C. 517; *Ogden* v. *Ogden* [1908] P. 46.

[5] 4 J. R. (N. S.) C. A. 50. Cf. *Armstrong* v. *Armstrong*, 11 N. Z. L. R. 201.

[6] 6 V. L. R. (I. P. & M.) 113. In *Parker* v. *Parker*, 5 C. L. R. 691, the general rule of domicile is asserted by the High Court. Cf. 12 V. L. R. 738.

Australia Court so held in 1907.[1] In Canada in 1887, while discussing the *Ash* divorce case, the Minister of Justice[2] distinctly adopted the doctrine of *Deek* v. *Deek*, and the *Ash* Bill to some extent proceeded on that view, which was also laid down in Mr. Justice Gwynne's judgement in *Stevens* v. *Fisk*.[3]

The position in Canada is rendered curious by the fact that the divorce is granted by Act of Parliament, but it is clear that the fact that the act is a legislative one would not alter the view taken of it by a Court in this country.

In 1845 the Bill of the United Provinces of Canada for the *Harris* divorce never received the royal assent, as it attempted to divorce a military officer only temporarily resident in Canada, who had married there, and it was pointed out by the Secretary of State that the Law Officers advised that such a divorce would not be held valid outside Canada.[4] It is important to note that the recent practice[5] in Canada is to insert in the preamble of the Divorce Bills a statement that the parties were domiciled there at the time of the divorce; it would be interesting to see how far an assertion by the Parliament of the Dominion, based on an examination by the Senate Committee, will be held in English Courts to preclude the possibility of raising the question whether in point of fact the parties were so domiciled. It should be said that this is a new departure, and that from some of the older Acts, for example c. 133 of 62 & 63 Vict., it would appear at least possible that domicile was not strictly regarded in the case of a deserted wife. Indeed, the Act 9 & 10 Edw. VII. c. 100 shows clearly in the preamble that the case is one of a wife whose husband has changed his domicile.

It may be added that the English doctrine has frequently been expressly adopted in the self-governing Colonies, as for example in the case of the Cape of Good Hope,[6] in the

[1] *West Australian*, July 2, 1907. Contra in New South Wales, *Okumura* v. *Okumura*, *Age*, June 24, 1908. Cf. *Brook* v. *Brook*, 13 N. S. W. L. R. Div. 9; *Tappenden* v. *Tappenden*, 25 W. N. 84.

[2] Canada *House of Commons Debates*, 1887, p. 1022.

[3] 8 L. N., 42. [4] *Parl. Pap.*, H. C. 529, 1864, p. 28.

[5] e. g. in the Divorce Acts of 1909 and 1910.

[6] *Peters* v. *Peters*, (1899) 9 C. T. R. 289; *ex parte Bright*, (1902) 12

Orange River Colony,[1] and in the Transvaal.[2] On the other hand, the Indian Divorce Act[3] appears clearly in terms to contemplate the divorce of persons not strictly speaking domiciled, and the Order in Council of May 1, 1890, establishing divorce in St. Helena, does not regard the law of domicile. The laws of the East Africa Protectorate (No. 12 of 1904), British Central Africa (No. 5 of 1905), and Uganda (No. 15 of 1904), which are based on the law in India, are more cautious in their wording, though they contain, as does the Indian Act, the vague word 'reside'. But it is also expressly provided that the jurisdiction shall be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England, and that would probably incorporate the modern practice.

Of course it is always possible to validate in the United Kingdom a divorce which is contrary to the law of domicile, but only by Act of Parliament, as in the case of *Malone's Divorce* (*Valid action*) *Bill*, 1905.[4]

It would, however, be obviously undesirable to insist on pressing for the maintenance of restrictions on divorce, even though based on domicile, for no Imperial interests can be said ultimately to be involved. On the other hand, it is as clear that in the interests of the persons concerned the granting of divorces which would be of doubtful validity outside the places in which they are granted is utterly objectionable, and therefore Dominion Parliaments are evidently anxious to avoid the granting of divorces in such cases.

It may be pointed out that an awkward position could easily arise in England if a man obtained a divorce in a Colony without being domiciled therein, for a second marriage would, under English law, expose him to the penalty of bigamy if ever

C. T. R. 299; *Wright* v. *Wright*, (1903) 13 C. T. R. 881; *ex parte Levy*, 16 C. T. R. 1041. But see *Jooste* v. *Jooste*, 17 C. T. R. 385; [1906] O. R. C. 7; [1907] O. R. C. 107.

[1] *Potgieter* v. *Potgieter*, [1904] O. R. C. 60; *ex parte Steward*, [1907] O. R. C. 37.

[2] 3 Sth. Afr. Rep. 76; *Murphy* v. *Murphy*, [1902] T. S. 179.

[3] No. iv. of 1869, s. 2.

[4] [1905] A. C. 314. Cf. *Sinclair's Divorce Bill*, [1899] A. C. 469.

he returned to England so that he could be proceeded against there, and this case is actually understood to have occurred.[1]

The cases of deviation from the list of prohibited degrees are also Australian for the most part. In South Australia the proposal was made in 1860 to legalize marriage with a deceased wife's sister, and the reserved Bill was not assented to; nothing daunted, the Parliament sent it up in 1863 to meet the same doom; in 1870 the Bill was again refused the royal assent, but in 1871 the Imperial Government yielded, and the Bill was allowed to become law (No. 21). Tasmania legislated to this effect in 1874 (No. 7), and a Queensland Bill, to which assent was refused in 1875, was allowed to come into force in 1877 (No. 25). New South Wales adopted the principle in 1876 (No. 20), and Victoria enacted it in its Act No. 453, and the rule was also adopted in Western Australia (58 Vict. No. 11), New Zealand (1880), and Canada (45 Vict. c. 42). In the case of Natal before responsible government it was not approved, despite the precedents of the Australian cases, on the ground that there was no real popular demand for the measure.[2] But in 1892 the Cape enacted, and there was allowed, an Act (No. 40) to provide for such marriages, and also to permit of a marriage with any female related to him in a more remote degree than the sister of his deceased wife, provided that she was not an ancestor of or descendant from the wife in question.[3] The principle has been extended to

[1] In every self-governing Dominion save Canada divorce courts exist. In Canada the older provinces, Nova Scotia, New Brunswick, Prince Edward Island (but no divorce has ever taken place there), and British Columbia have divorce courts. See Wheeler, *Confederation Law*, pp. 250 seq.; *Senate Debates*, 1910–1, pp. 250 seq. It is interesting to note that Nova Scotia by 32 Geo. II. c. 17 adopted the Scottish rule of desertion founding a divorce, but this was repugnant to the laws of England, and violated the commission under which the Assembly and Council legislated, so the English law was replaced by 1 Geo. III. c. 7. Since 1867 the law is stereotyped, as the provinces cannot alter, and Canada, which can, will not because of French Canadian feeling. There is no divorce in Ontario, Quebec, Manitoba, Saskatchewan, and Alberta, save by Canadian Act.

[2] Lord Norton, *Nineteenth Century*, July 1879, pp. 172, 173. See Act No. 45 of 1898; *Parl. Pap.*, C. 5091, pp. 113–22.

[3] Since this Act, at any rate, it is not incest to have relations with a wife's sister, in the view of the Cape Supreme Court; *R.* v. *Delport*, 11 C. T. R. 412.

a deceased husband's brother by a New Zealand Act of 1900 (No. 72).[1] By a law of the Dominion of Canada of 1890 (c. 36) it is enacted that all laws prohibiting marriage between a man and a daughter of his deceased wife's sister, where no law relating to consanguinity is violated, are hereby repealed both as to past and future marriages; this is also so in South Australia. At one time it was doubted if in New South Wales there were any rules as to prohibited degrees, as it was held that the English law (28 Henry VIII. c. 7) had not been introduced into the state. But this is now decided otherwise.[2]

The marriages with deceased wives' sisters were the cause of a good deal of difficulty; their effect in England was that, though they were recognized in the case of persons domiciled in a Colony as valid for all other purposes, they did not confer any right to land, or of course to a title, in the case of an intestacy; the case actually happened, though naturally it was not a common one:[3] but beyond that there was the feeling that the marriage was not quite proper inasmuch as the marriage in England would not have been valid, and English people who went to the Colonies and contracted such marriages while not domiciled there found their marriages absolutely invalid in England.[4] Moreover, the history of these marriages showed that their invalidity was partly artificial, being, as a matter of fact, due to an Act of 1835 which caused them to be absolutely instead of merely voidable as before by action brought in the lifetime of both parties. In 1896 the Agents-General petitioned the Government, in 1897 the Premiers at the Conference brought the matter up, and in 1904 the Government of the Commonwealth made an appeal, while in 1898 and 1900 a bill to remedy the situation passed a second reading in the Lords, and on July 13, 1905, Lord James of Hereford pressed for action, but in vain. The result was the passing of an Act in 1906 to recognize for

[1] See *Consol. Stat.*, 1908, No. 113, ss. 44, 45. Proposed also by Mr. Scaddan in 1911 in Western Australia.

[2] *Miller* v. *Major*, 4 C. L. R. 219, affirming the decision of the Supreme Court, 6 S. R. (N. S. W.) 24. Cf. *Parl. Pap.*, H. C. 144, 145, 1894, p. 38.

[3] Cf. Hammick, *Law of Marriage*, p. 253.

[4] Cf. *Sottomayor* v. *De Barros*, 3 P. D. 1; Dicey, *Conflict of Laws*,[2] p. 631.

all purposes the validity in England of such marriages, and then the next step was to validate them for England by an Act of 1907, a clear and interesting case of the reaction of a statute passed for the benefit of persons in the Colonies for the benefit of persons in the United Kingdom, however ludicrous the benefit may seem to be.[1]

It may be noted that the status of offspring of the other marriages permitted contrary to the English law by Colonial Acts in this country remains doubtful; the question is, of course, solely one of private international law as interpreted by the English Courts, and their attitude seems not yet absolutely fixed.[2] It may be added that a new difficulty has been added somewhat gratuitously by the passing of Acts in several of the Australian states, including Western Australia[3] and Tasmania,[4] for legitimation after subsequent matrimony, which omit the important provision that the legitimation should depend on the parents having been legally able to intermarry at the time when the actual marriage took place, as required in the Scottish law. This will have the result of throwing doubt on the status of such offspring, and it seems totally impossible to defend the Acts.

[1] See *Parl. Pap.*, Cd. 2398; *Hansard*, ser. 4, cxlix. 524–7; clvii. 316–33; 1548–57; clxxx. 1423 seq.; Act 6 Edw. VII. c. 30; 7 Edw. VII. c. 47.

[2] An Imperial Act (28 & 29 Vict. c. 64) was deemed necessary to validate imperially Acts passed locally to validate *ex post facto* marriages, but it only validates marriages which would have been legally possible under English law, and its effect therefore may be disregarded. The difficulty now is what will be regarded as a valid marriage in England, e.g. in the case of persons not domiciled in the Colonies, and the Act cannot prejudice such marriages as Tarring, *Law relating to the Colonies*,[3] pp. 133, 134, seems to suggest. See Dicey, op. cit., pp. 479 seq.

[3] The Bill was very properly reserved by the Governor, but was assented to in 1910, as the Imperial interest affected is very slight, consisting merely of the general interest in avoiding legal difficulties; see No. 44 of 1909.

[4] 5 Edw. VII. No. 3. The other Australasian Acts follow the Scottish law; see New South Wales, No. 23 of 1902; Victoria, No. 1835; Queensland, 63 Vict. No. 11; South Australia, No. 703; New Zealand, No. 28 of 1894; so in Quebec under the *Civil Code*, ss. 237–9, and in South Africa under the Common Law; see Fitzpatrick, *Journ. Soc. Comp. Leg.*, vi. 37, 38, 40–3. But see Victoria *Parliamentary Debates*, 1911, pp. 660–71.

CHAPTER X

MILITARY AND NAVAL DEFENCE

§ 1. Military Defence

It followed inevitably from the grant of responsible government that the Imperial Government ceased to be responsible for the military defence against internal disturbances of the Colonies to which responsible government was accorded.[1] It was clear that the Imperial Government could not consent to permit the Imperial troops to be directed by a government over whose action they had only such indirect control, as could be exercised by the Governor, while on the other hand, the presence of troops in the Colony rendered it unnecessary for the Colonial Government to observe that moderation in action which was essential for the preservation of the internal peace of the Colony. Moreover the expense was very heavy ; in 1858 the Colonial military expenditure of the Imperial Government was nearly £4,000,000, towards which the Colonies gave but £380,000. A departmental committee in 1859 (Sir T. Elliott of the Colonial Office, Mr. Hamilton of the Treasury, and Mr. Godley of the War Office) reported strongly against the existing system, but the Imperial Government had no mind to withdraw troops separately so as to embarrass the responsible governments, and although two committees of the House of Commons examined into the question in the sixties, it was not until March 4, 1862, that the House of Commons,[2] on the motion of Mr. A. Mills, resolved that, while it was recognized that all parts of the Empire must have Imperial assistance against danger resulting from Imperial policy, as far as was possible

[1] The royal prerogative to raise troops is of course undoubted in all the Dominions where it is not regulated by law ; see Sir S. Way's judgement in *Napier* v. *Scholl*, 1904 S. A. L. R. 73, at p. 88, as regards forces raised in South Australia for South African service (cf. New South Wales Act, No. 12 of 1899), and cf. also *Williams* v. *Howarth*, [1905] A. C. 551 ; *Howarth* v. *Walker*, 6 S. R. (N. S. W.) 98.

[2] *Hansard*, ser. 3, clxv. 1032–60.

the responsibly governed Colonies should bear the expenses of their own internal defences, and ought to assist in their own external defence. It was not then insisted, as might have been expected, that they should not only bear the expenses but also make arrangements by the raising of forces locally to maintain internal peace and good order. But one followed naturally from the other. In 1863 the Governors of the Australasian Colonies were informed by the Imperial Government [1] that it was not intended longer to maintain at Imperial expense the garrisons in these Colonies, and that if in the future these garrisons were kept there it would be necessary that the Governments should pay for them at rates specified in the Secretary of State's dispatch.[2] The result of this procedure was not long delayed, and the Imperial garrisons were rapidly withdrawn from the Australasian Colonies and Newfoundland, the last of the forces leaving in 1869 and 1870. The barracks, fortifications, and land and arms and munitions in actual use were handed over free of cost, subject only to promises of reimbursement if it were in the future necessary to send Imperial forces to those Colonies. There was a short interval before any regular forces were organized, but a report in 1876 by Sir W. Jervois and Lieutenant-Colonel Scratchley on the fortifications of Australia led to action, and gradually forces both regular and militia were created in all the Australasian Colonies, though Newfoundland still remains without such forces. In 1877 the possibility of war with Russia had some effect on the increase of the number of the troops; in 1883–4 militia as opposed to volunteer forces appeared; in 1889 Major-General Edwards reported on the defences of Australia, with the result that Sir H. Parkes decided to push forward federation as essential, and the need of defence was one of the reasons which caused the Australian Colonies to

[1] See *Parl. Pap.*, C. 459, pp. 2, 3.

[2] Cf. Earl Grey, *Colonial Policy*, i. 355–66, 260 seq. (Canada); Adderley, *Colonial Policy*, pp. 44, 45, 53, 380–94; Higinbotham, in Morris's *Memoir*, pp. 204–9; Jebb, *Colonial Nationalism*, pp. 103 seq.; Ewart, *Kingdom of Canada*, pp. 169–213; Rusden, *Australia*, iii. 400; Commonwealth *Official Year Book*, ii. 1075–80; iv. 1074–7.

agree upon federation. The immediate result of federation was not simply the improvement of the forces in question, but eventually greater efficiency was evolved, and under the influence of a visit from Lord Kitchener in 1909 it was determined to adopt, by an Act of 1910, No. 37, amending an Act of 1909 (No. 15), a scheme which will provide compulsory military training for youths between the ages of 12 and 25, exemption being allowed only on physical grounds, though further exemptions are allowed from actual service. There will also be a small permanent force and a large partially trained militia force, while the Defence Act No. 20 of 1903 already embodied the principle of compulsory service by the male population in time of war. The history of events and the state of affairs in New Zealand is substantially the same. An Act of 1909 (No. 28) was amended in 1910 (No. 21) to extend compulsory training up to 25 years of age.[1]

The same process of the withdrawal of the Imperial troops was applied to the Dominion of Canada, but it was considered necessary in the Imperial interest to maintain small garrisons at Halifax and Esquimalt, half of the cost of the latter being defrayed by Canada, in view of the importance of the naval establishment at these ports, for the service of the Royal Navy. These garrisons were finally withdrawn owing to the patriotic offer of Canada during the Boer War, when they undertook to maintain the garrisons at these places at their own expense.[2] The change in naval policy which followed the Boer War rendered the maintenance of these ports of much less importance to the Imperial Government, and arrangements were finally made in 1910 with the Canadian Government to transfer, by Order in Council, the Admiralty property at these ports to the control of the Dominion Government, on the understanding that the necessary facilities for the docking and coaling of His Majesty's vessels of war would be given, and that the naval dockyards would

[1] For these Acts see *Parl. Pap.*, Cd. 5135 and 5582.

[2] The offer was made in 1902 and finally accepted in 1905; see *Parl. Pap.*, Cd. 2565, which gives a clear account of Canadian views as to the constitutional position; see also *Canadian Annual Review*, 1905, pp. 459–65.

be maintained in a state of repair. The necessary power to do so was conferred by the *Naval Establishments in British Possessions Act*, 1909, and the Order in Council for Halifax is dated October 23, 1910, that for Esquimalt, May 4, 1911. A change in the position of affairs is seen clearly by the fact that Imperial forces were employed in 1870 for the suppression of the Red River revolt, and that the more serious North-western Rebellion of 1885 was suppressed by the militia forces of Canada. Canada, like the Australasian Dominions, has a small permanent force and a considerable militia body, governed by *Revised Statutes*, 1906, cc. 41–3, and service in time of war is compulsory on the male population.

Newfoundland has now no military forces, nor even militia, but it has some volunteer cadet organizations.

In the case of the Australasian Colonies and of Canada there has been little friction between the Colony and the Imperial Government on military questions. The co-operation of the militia and the Imperial forces in Canada in 1870 was complete and satisfactory. On the other hand, some difficulty arose in New Zealand in the serious disturbances in the years 1862–9; the disturbances were dealt with both by the local and Imperial forces, and the Ministry asserted its claim not only to direct the operations, but also to control the fate of the prisoners of war captured by the Imperial troops during the course of the operations.

In this case[1] the situation was greatly complicated by the fact that Sir George Grey, the last Governor who exercised a striking personal influence over public affairs in the Colony, was anxious to carry out in great measure, as he had done during his first Governorship in New Zealand and during his Governorship in South Africa, an independent policy, and thus he was brought into conflict not only, as in South Africa, with the Imperial Government, but also with his ministers. His Ministry, again, were hampered by the strong feeling which evidently existed among many people in New Zealand, that it was undesirable to adopt an attitude

[1] Cf. Adderley, *Colonial Policy*, pp. 146 seq.; Henderson, *Sir George Grey*, pp. 217 seq.; Collier, *Sir George Grey*, pp. 108 seq., 150 seq.

of independence with regard to questions of native policy, on the ground that the country was not yet in a position to afford to pay for military operations.

The Governor, shortly after his arrival in the Colony and his taking up office, decided that with regard to native affairs he would reverse the policy which had been determined upon in 1856, when responsible government became effective, and would in native affairs, as in other matters, rest on the advice of his ministers ;[1] but there can be little doubt that he intended to guide his ministers rather than be guided by them. On the other hand, the Imperial Government were anxious to accept the arrangements by which they were relieved from the responsibility of conducting native affairs, a responsibility which, as the Governor pointed out, was undesirable, as the Governor had no adequate authority to carry it into effect, being destitute alike of sufficient executive officers and of any substantial pecuniary resources[2] over which he could exercise control independent of his ministers. At the same time the Imperial Government held that, if the control of native affairs were to be exercised by the Colonial Government—as had been the desire of the Colonial Government—it must undertake the responsibilities entailed by such policy both pecuniarily and in point of control, and they wished, therefore, to withdraw as soon as possible from New Zealand the Imperial troops which, to the number of over five regiments, were being maintained there in the main at the cost of the Imperial Government, for the Colonial Government contributed only a nominal sum, £5 a head, towards the cost of the forces, and were excused the actual payment of that sum on the understanding that they would spend the money thus saved on the native administration.[3]

The numbers of the natives were so small, and of those in arms—never over 2,000, it is believed—so utterly incom-

[1] See his dispatch, November 30, 1861 ; *Parl. Pap.*, August 1862, p. 27, and the Secretary of State's reply, ibid., p. 80, and H. C. 467, 1863, p. 134.

[2] A sum of £7,000 secured by the Act of 1852 (15 & 16 Vict. c. 72) was utterly inadequate and had to be supplemented by the Parliament.

[3] Cf. *Parl. Pap.*, June 26, 1866, pp. 57 seq. ; C. 83, pp. 1 seq., 79 seq., 95 seq., 187 seq., 195 seq. ; Rusden, *New Zealand*, ii. 78, 87.

mensurate with the number of European settlers, that it was felt unnecessary to maintain, with great inconvenience and injury to the public service, large bodies of costly troops ill fitted for guerrilla warfare in a difficult country, and there seems little doubt that in this regard the desire of the Imperial Government was fully legitimate.

On the other hand, the Imperial Government were anxious as far as was possible to consider the needs of New Zealand in the mode and time of withdrawal of the forces. Difficulties arose from the fact that, after accepting the responsibility for native affairs, Mr. Fox's Ministry was defeated on July 28, 1862, by the casting vote of the Speaker on a proposed resolution in favour of placing the ordinary conduct of native affairs under the administration of the responsible ministers, and on August 19 Mr. Domett's ministry reasserted the ultimate responsibility of the Governor. But the Imperial Government remained firm, and by dispatch of February 26, 1863, definitely decided to relinquish their control over the administration of native affairs, and the General Assembly accepted responsibility by resolution in November 1863.[1]

Difficulties then arose as to the degree of control to be exercised over the Imperial troops, on the one hand by the Governor and on the other hand by the Colonial Ministry. The Colonial Ministry asserted its claim that it should control operations, and in particular that it should have the right to decide what steps should be taken in accordance with an Act passed in 1863, empowering the Governor to confiscate the lands of insurgent natives. The Governor was doubtful about confiscation, and the Imperial Government were much afraid lest wholesale confiscation should lead to the extension of the war, for the carrying on of which they were being made responsible. The Whitaker-Fox Ministry, which had been formed in October 1863, resigned in 1864, during the Parliamentary recess, as a consequence of disagreement with

[1] See *Parl. Pap.*, March 3, 1864, p. 96, and for the acceptance of the Legislative Council, *Parl. Pap.*, June 1864, p. 6; Henderson, op. cit., p. 233. See also *Parl. Pap.*, March 2, 1865, p. 13 (Mr. Weld's views); C. 83, pp. 241 seq. (Mr. Stafford's views); Rusden, ii. 90 seq.

the Governor, who on his own responsibility offered certain terms to natives who should surrender.[1] They had come into violent conflict with the Governor as to the respective rights of the Imperial Government and the Colonial Government as to the treatment of prisoners of war. These prisoners were confined, by the desire of the Colonial Government, on a hulk which the Governor visited and thought unsuited for their detention; moreover, he thought that they should be brought to trial with all reasonable celerity, while the Government withheld action. The Secretary of State ultimately instructed the Governor explicitly that he was at liberty in this matter, as the war was being carried on by Imperial troops, to act on his own responsibility, and to dispose of the prisoners as he thought fit. The Government objected to this view and maintained that they were entitled to dispose of the prisoners. This elicited from the Secretary of State an expression of his views to the effect that the Government were really asking that they should be supplied with troops and a commander by the Imperial Government, while the Imperial Government was divested of all control over the operations of these forces for which they paid, and were thus reduced to the position of being tributary to the Colonial Government.[2]

The position was rendered more and more difficult by disputes between the Governor and the general commanding with regard to the conduct of hostilities, and in consequence of the absolute inability of the Governor and the officer commanding to agree as to the policy to be pursued, and also of the Governor insisting on retaining troops which the Imperial Government had desired should be returned to Australia, the Imperial Government decided to take the control of all the troops save one regiment out of the hands of the Governor, instructing him that the other troops should be treated as being merely in the position of troops which had called at New Zealand en route.

[1] See *Parl. Pap.*, March 2, 1865, p. 4.

[2] See *Parl. Pap.*, H. C. 467, 1863, p. 242; July 1864, p. 18; February 7, 1865, pp. 117 seq., 197. Cf. *Parl. Pap.*, H. C. 307, 1869, pp. 232 seq., 420, 522 seq.; Rusden, ii. 185–90.

The Governor protested energetically against this decision, and went so far as to assert that by the Constitution and by his commission as Governor and Commander-in-Chief, the Governor must possess full military control over all the forces, Imperial or otherwise, which were in the Colony, and that this control could not be taken away from him legally by a mere decision of the Imperial Government.[1]

The Governor's position was clearly untenable, and it was a mistake to assume that an alteration was made by the Imperial Government in the actual position of the Governor with regard to the control of Imperial troops in a Colony. With regard to the one regiment which was still to be left, and which was left until 1869, the Governor still retained the same control as he constitutionally had. He was not entitled under that control to direct the details of military operations, but he was entitled to give general directions as to the military operations, and down to the end of his tenure of office he continued to have this power of control. On the other hand, the Imperial Government were obviously entitled to remove from the Colony troops which they did not intend should be employed therein, and the removal of such troops from the Governor's control could not be regarded as a breach of constitutional practice or an interference with the powers of self-government of the Colonies.

The Ministry, which had first been anxious to adopt a self-reliant policy, and which had passed resolutions in favour of such a policy, changed its attitude in 1868, when certain prisoners who had been confined on the Chatham Islands escaped from their confinement and landed in New Zealand. They then urged that the troops should be retained for a time, but they still declined to accept responsibility for the payment of the troops, and the Imperial Government were no longer prepared to acquiesce in the retention of forces for which no payment was made. Vigorous protests by the

[1] See *Parl. Pap.*, February 1866, p. 259; 1867, pp. 44 seq., 55 seq., 62 seq.; H. C. 307, 1869, pp. 2 seq., 13 seq., 19 seq., 23 seq. In 1881 the Colonial Government claimed the right to move troops independently of the Governor; Rusden, iii. 406; *Parl. Pap.*, C. 3382, p. 190.

Governor, who had returned to London after his retirement from the Governorship of the Colony, and from others, had no effect, and the troops were finally withdrawn in 1869.[1]

The only conclusion which can fairly be drawn from the circumstances is that the use of Imperial troops by a Colonial Government can hardly ever be successful.

Incidentally it was proposed by the War Office that the officer commanding the Imperial troops should be given full control over the Colonial forces employed during the hostilities. To this proposal exception was promptly taken by the Colonial Office, which laid stress on the fact that it would be a contradiction of the policy of leaving the Colony to deal with questions of itself, if the Imperial Government claimed direction of the operations, and that the only claim which could possibly be made was that the Imperial officer, while actually engaged in operations which were being conducted jointly by Imperial and Colonial troops, should take command of the joint forces.[2]

Circumstances in the case of South Africa have been decidedly different. The South African Colonies have always formed a portion, and one not in recent years, in extent of territory, the most considerable, of the British possessions in South Africa. Even at the present time it is essential to maintain a garrison in South Africa for the safety of the British possessions and Protectorates, though it was the desire of the Imperial Government in 1869 to 1872, when they urged upon the Government of the Cape to accept responsible government, to withdraw gradually from the Cape all the Imperial forces stationed therein with the exception of a regiment for the protection of the naval station at Simon's Bay.[3] This aspiration was never, however, carried out, for the years after responsible government were not merely years of growing difficulty with the native population, culminating in the efforts of the Cape to control

[1] See *Parl. Pap.*, H. C. 307, 1869, and C. 83.

[2] *Parl. Pap.*, H. C. 307, 1869, p. 443.

[3] *Parl. Pap.*, C. 459, 708, 732. Cf. Lord Blachford's article in the *Nineteenth Century*, August 1879, pp. 271 seq.

the Colony of Basutoland, which had been permanently transferred to their care in 1871, and which it was found necessary in 1883 to retransfer to the Imperial Government, but the question of the Zulus became acute, and, when that was disposed of, the annexation of the Boer Republic of the Transvaal in 1877, followed by a revolt of the Boers and the subsequent retransfer, gave a new Imperial interest to the maintenance of forces in South Africa. Gradually, however, with the settlement of the country the Imperial forces were reduced, and in the negotiations for the grant of responsible government to Natal the Colony was clearly given to understand that the Imperial Government would only maintain Imperial forces therein for a period of five years after the grant of responsible government was effected.[1] But by that time a new Imperial difficulty had arisen in the shape of the incursion of the forces under Dr. Jameson into the territories of the South African Republic, as the Transvaal had been called since the second treaty of 1884. After that event the relations between the Imperial Government and the Government of the Republic became increasingly strained, and ultimately the war broke out in 1899. After the conclusion of the war in 1902 the garrison of South Africa had been considerably reduced, but it still remains a considerable one, and South Africa will not probably be able to undertake its own defence until some time has elapsed after union. Mr. Molteno[2] in the debates on the South Africa Bill urged that the troops should be withdrawn, re-echoing his father's view in the case of the Cape—but the responsible government appears not to be eager to arrange for this. The responsibility for the internal order of the Bechuanaland Protectorate, Basutoland, and Swaziland will still rest with the Imperial Government, who are also ultimately responsible for the internal order of the whole of Rhodesia, though the control of the police, taken away after the raid, was restored in 1911 to the Chartered Company's administration.

[1] *Parl. Pap.*, C. 6487, p. 22. Of course against external attack by the South African Republic a promise of aid without question was given; see *Parl. Pap.*, Cd. 44. [2] *House of Commons Debates*, ix. 986.

Naturally it has not always been possible to adjust without friction the relations of the Imperial and the Colonial Governments in connexion with the operations of Imperial and Colonial troops. The Governor of the Cape held, until the annexation of the Transvaal, a separate commission as High Commissioner for South Africa,[1] and in that capacity, and not as Governor of the Cape, was entrusted with the conduct of the relations of the Crown with the native tribes beyond the borders of the British possessions in South Africa. After the grant of responsible government the position became more and more difficult, and eventually a violent dispute arose between Sir Bartle Frere, then Governor of the Cape, and the Ministry of the day, the first Ministry under responsible government, which was headed by Mr. Molteno.[2] There were at the time of the dispute in 1877 two revolts raging, and Sir Bartle Frere was extremely anxious that the Colonial Government should not attempt to deal with these revolts, which appeared to him very serious, by their own resources only, but should secure the assistance of the Imperial troops in the Colony. On the other hand, the Ministry urged with some vehemence that the presence of the Imperial troops was contrary to the wishes and feelings of the Colony, and that they threatened the independence of the Colony, and they advised that they should be entirely withdrawn. Further, the Ministry proceeded to continue to urge that the Governor in his titular capacity as Commander-in-Chief should not interfere in any way with the Colonial forces, and they appointed one of the Ministry to take complete charge of warlike operations, independently of the control of the Governor and independently of the Imperial officer commanding the forces in the Cape of Good Hope. They also proceeded, without consulting the Governor, to make appointments to the military forces in his name, although he had not authorized such appointments, and

[1] For a discussion in 1888 of the relations of the Governor and High Commissioner, cf. *Parl. Pap.*, C. 5488.

[2] See *Parl. Pap.*, C. 2079, 2144; Cape Acts Nos. 16 of 1855; 5 of 1878, s. 31; 7 of 1878, s. 32.

generally they proceeded to act as if they, and not the Governor in Council, were the executive authority of the Colony. The Governor, naturally, was unable to acquiesce in this position, which in his opinion would, if continued, be most detrimental to the carrying on of the necessary operations against the natives in the Colony. He therefore determined that he must take strong steps to end the situation. He pointed out that appointments and promotions which he had not approved had been gazetted ; moreover steps had been taken which were liable to stir up the Gaikas by attacks made upon them, which simply complicated the situation. Eventually the Governor felt that it was no longer possible to work with his Ministry. He made every effort to induce his ministers to leave the control of the operations to the Imperial forces, but he was unable to obtain their consent to the course. Finally he decided that, in view of the unmistakable determination of Mr. Merriman, who was acting in charge of the forces, to set up his own dictatorship in opposition to local and constitutional authority of every kind—civil as well as military—he was unable to continue the Government any longer in office. The Government, he held, declined absolutely to accept the decision of the Governor, and determined to continue the Commissioner of Crown Lands as Responsible Dictator and Commander-in-Chief in military affairs. If ministers were justified in their proceedings, there was no course consistent with the respect due to Her Majesty's Government and the safety of Her Majesty's forces except to withdraw the Governor, the Commander of the forces, and the troops, as suggested by ministers.

Fortunately for the Governor, his strong action in removing the ministers from office was entirely supported by the events which ensued. Mr. (afterwards Sir) G. Sprigg undertook to form a Government, and did so with success. On the meeting of Parliament, Mr. Merriman endeavoured to obtain from the House of Assembly a vote practically censuring the Governor for the dismissal of the ministers. But in the first place the Speaker of the House prevented the

motion being put in such a form as to reflect upon the Governor instead of attacking the ministers, and secondly the motion was unsuccessful, while the Government proceeded to accept the Governor's advice and placed the forces under the supreme control of the general officer commanding in South Africa. The Secretary of State also approved his action in a dispatch of March 21, 1878. This case was also of importance because of a question that arose as to the proclamation of martial law. It appeared from a dispatch of June 9, 1878, that he had agreed to a declaration of martial law on the advice of ministers, so as to provide that Colonial judicial officers should preside at the trials of martial law and try offences, in place of dealing with captured persons by drum-head court martial. In a reply on February 16, 1878, the Secretary of State expressed regret that it should have been necessary to resort to martial law, and his hope that it would be found possible to amend the Colonial law so as to avoid the recurrence of similar proceedings.

A favourable view of Sir B. Frere's proceedings is taken by Todd,[1] but, on the other hand, Mr. P. A. Molteno, in his life of his father,[2] has represented the situation in a manner very unfavourable to Sir Bartle Frere. It was, in his opinion, the aim of Sir J. Molteno to encourage the Colony to adopt a self-reliant attitude and to carry out operations affecting the Colony by means of the local forces only. Nor can there be much doubt that it would be impossible to defend many of the views expressed by Sir Bartle Frere. He could claim by law and by constitutional practice no power whatever over the local forces except what was given to him by law, and the fact that the existing Acts passed before the grant of responsible government gave powers of control to the Governor

[1] *Parliamentary Government in the British Colonies*,[2] pp. 480–90. Cf. Wilmot, *South Africa*, i. 238–61; above, pp. 289, 290.

[2] *Sir John Molteno*, ii. 300–401. See also Cape *Parl. Pap.*, 1878, A. 4, p. 14, for an able opinion by the Cape Attorney-General, and cf. *Parl. Pap.*, C. 2740, p. 103. Sir B. Frere was at least very headstrong, and quite ignorant of constitutional law. It is fair, however to say that Sir W. Manning held that a New South Wales Act of 1867 conferred a personal duty on the Governor; see Clark, *Australian Constitutional Law*, pp. 263 seq.

was quite irrelevant. After the grant of responsible government these powers, like every other power, required to be exercised on the principles of ministerial responsibility. The Governor had therefore no inherent right to place the local forces under the control of the Imperial forces, and no exception can be taken to the constitutional position occupied by Mr. Merriman on the principle laid down by Sir J. Molteno. The accusation that commissions were issued in the Governor's name is met by the statement that the matters done were matters of routine which were not normally submitted at all to the Governor. The question on that point really raises the problem of what matters are matters of routine and what matters are too considerable to be treated in this way, and in any case different opinions may legitimately be held.

On the other hand, it must fairly be said for Sir Bartle Frere that his position was a difficult one, for as High Commissioner he had a general responsibility for relations with native tribes in South Africa, which he could not share with his ministers however gladly he might welcome their advice, and however willingly he might normally accept it.

His opinions were therefore entitled to serious consideration by his Ministry, and the fact that the country upheld Sir Gordon Sprigg must be placed to his credit in considering the question of the rights and the wrongs in the matter. But it must at once be said that Sir Bartle Frere, both in this and in other matters, was clearly too much inclined to think that, as Governor, he was entitled to make free use of the Imperial troops independently of the wishes of his ministers; on this point he was repeatedly told by the Imperial Government that the Imperial forces were in the Cape merely for the purposes of defending an Imperial trade route, and that it was not intended that the Cape should be defended either from internal risings or from the attacks of external tribes by the Imperial forces.

In the case of the war in South Africa from 1899 to 1902 the Colonial forces assisted readily the Imperial troops, and both in Natal and in the Cape of Good Hope the local troops were placed fully under the control of the Imperial

Commander-in-Chief. It was necessary on that occasion also to administer martial law throughout the country,[1] and the steps taken were validated by Acts of the Natal and Cape Legislatures in due course,[2] and so in the Transvaal[3] and the Orange River Colony.

The military forces of the Dominions are in every case raised and provided for by the local Acts passed in virtue of the general legislative powers of the Parliaments in question. In the case of Canada, the Dominion alone has, of course, power to deal with military defences. In the case of the Commonwealth, the Commonwealth has, by s. 51 (vi) of the Constitution, power to legislate for the naval and military defences of the Commonwealth and of the several states, and of the control of the forces to execute and maintain the laws of the Commonwealth, and, by ss. 52 and 69, sole power to legislate for the defence departments. This power is not an exclusive power, but by s. 114 of the Commonwealth Constitution a state is not able without the consent of the Parliament of the Commonwealth to raise or maintain any naval or military forces, while by s. 119 the Commonwealth shall protect every state against invasion, and, on the application of the executive government of the state, against domestic violence. Accordingly in 1900, when new letters patent were issued for the Australian states, it was expressly provided that the Governor-General alone should be termed Commander-in-Chief, and that the Governors, who had hitherto been in addition to Governors also Commanders-in-Chief in their states, should cease to hold that position, as normally there would no longer be in the states armed forces under the control of the State Governors.

In all the Dominions the Governor or Governor-General

[1] See *Parl. Pap.*, C. 981, 1364, 1423. For the Colonial forces, see Cd. 18 and 469; Canada *Sess. Pap.*, 1900, No 20, 49.

[2] Mr. Schreiner, Cape Premier, once contemplated the Cape remaining neutral to avoid the danger of rebellion, but this was impossible in law and fact; see Cana, *South Africa*, pp. 184, 185, 206; *Debates*, 1899, p. 333.

[3] See Cape Acts Nos. 6 of 1900; 4–6, 10 of 1902; Natal, Nos. 15 of 1900; 41 of 1901; 22 and 30 of 1902; 26 of 1903; Transvaal, Nos. 38 of 1902; 22 of 1903; Orange River Colony, No. 25 of 1902.

is also Commander-in-Chief.[1] The term is liable to some misapprehension, and has no doubt led to some confusion,[2] inasmuch as the Governor has in certain cases been held to have powers with regard to the local forces which were not merely the ordinary powers of the Governor in Council. In every Colony the Governor in Council has, of course, very important powers under the Acts relating to the forces, but these powers do not include, and are not intended to include, the command of the forces, except in the sense that the Governor is titular Commander-in-Chief as the representative of the Crown, which alone, of course, can raise armed forces.[3] For example in 1872, the Governor, Sir Hercules Robinson, in New South Wales, found himself in an embarrassing position in consequence of the fact that he was required by Act No. 5 of 1867 to exercise certain powers of command as regards removal of officers of the local forces, and he was advised by his law officers that these powers were to be exercised by him without ministerial advice.[4] The result was that he was brought into collision with the Legislative Assembly, which disapproved his action in the case of a member of these forces called Rossi, and the Governor sensibly pointed out that it was undesirable in such a matter to leave anything in the hands of the Governor personally. In the same way the position in South Africa was complicated unnecessarily by the fact that the Governor was given by the local Acts various powers as to the forces, which apparently threw upon him a personal responsibility. As Commander-in-Chief, of course, the Governor has no power or control over the Imperial forces within the Colony. His legal position with

[1] The King gave up the title in 1793, but it has lingered on in the Dominions; see Harrison Moore, *Commonwealth of Australia*,[2] pp. 175, 176.

[2] Clearly in the case of Sir B. Frere, and cf. the New South Wales case in Clark, *Australian Constitutional Law*, pp. 263 seq.

[3] It is, however, a mere blunder to assume that the King's commission issued to officers in England gives them any power of command over Colonial forces; the only power to command such forces must come from commissions under local Acts or Acts recognizing the validity of Imperial commissions; cf. *Parl. Pap.*, Cd. 2565.

[4] *Parl. Pap.*, C. 1202, pp. 53, 54; Clark, loc. cit.

regard to the Imperial forces, and still more of course the legal position of his ministers, is a simple one. As laid down in No. 10 of the *Colonial Regulations* it is the general obligation of all His Majesty's civil and military officers to offer mutual assistance to each other in cases affecting the King's service; and by the King's regulations for the navy, the Commander-in-Chief of a station, or the senior officer present at a port, is instructed to pay due regard to such requisitions as he may receive from the Governor having for their object the protection of His Majesty's possessions, the benefit of the trade of his subjects, or the general good of his service. The *Colonial Regulations* also provide

11. In urgent cases, when the requisitions may conflict with the instructions from the superior naval authority under which he is acting, and when reference by telegraph or otherwise to such superior authority is impracticable, a naval officer is instructed to consider the relative importance and urgency of the required service as compared with his instructions, whether general or special; and he is to decide as in his judgement may seem best for His Majesty's service. In so doing he is instructed to bear in mind the grave responsibility that would rest on him if the circumstances were not such as to fully warrant the postponement of the instructions from his naval superior to the more pressing requisition from the Governor.

12. In cases where high political considerations demand the decision of His Majesty's Government in respect of the action to be taken, the Governor should communicate his opinion that the presence of one of His Majesty's ships is necessary direct to the Secretary of State, instead of direct to the commanding officer of His Majesty's ship, unless the lives and property of British subjects are in such imminent peril as to demand immediate action.

Recently in Australasia a determined effort has been made to reorganize the military forces on a more effective basis, a desire no doubt prompted by the growth of a strong power in the Far East, and stimulated by a visit of Lord Kitchener in 1910 to Australia and New Zealand. The military defence proposals of the Commonwealth as introduced in the *Defence Acts* of 1909 (No. 15) and 1910 (No. 37) contemplate the setting on foot of a total citizen army of 127,000 men, to be raised

to that strength by 1920. About 80,000 are estimated to be needed for defence, half for the garrisoning of fortified places and other important centres, and half for offensive action against an invader. There are several changes in the Act from the scheme adopted by the Government in 1909, but the important one is the extension of training to twenty-five years, a demand met readily by the Parliament. But it is to be noted that no persons now over 21 become liable under the Act. The forces will be divided into junior cadets from 12 to 14 years of age, who are to be trained for 120 hours in each year; senior cadets from 14 to 18 years of age, who will be trained for four whole-day drills, twelve half-day drills, and twenty-four night drills, and the citizen forces from 18 to 25 years of age. In the citizen forces the training will be compulsory, sixteen whole-day drills or their equivalent being required, and eight of these day drills must be passed in camps of continuous training, with longer periods for the skilled arms like artillery and engineers. Provision is also made for a Military College, which will eventually supply the officers to train the forces, and graduates of which only shall be appointed officers of the permanent forces. The New Zealand *Defence Act* of 1909 (No. 28) was similarly amended in 1910 (No. 21) to render training up to 25 years of age compulsory, and in both cases appropriations have been made for the necessary arms and equipment of the troops. In time of war military service is compulsory on all males from 17–55 in New Zealand, from 18–60 in Australia.[1]

There should be briefly mentioned the attempts which used to be made to induce the Colonial Governments to accept Imperial advice in military matters. At one time the *Militia Act* of Canada rendered the employment of a British general officer in supreme command necessary, but that requirement was never satisfactory; the officer in

[1] South African defence is not yet organized, but Natal was the first Colony by Acts Nos. 36 of 1903; 30 of 1905, and 36 of 1906, to adopt universal training, and the Cape and Natal Colonial forces served with ability in native wars. The Transvaal had a Volunteer force which helped Natal in the native rebellion of 1906–8. An Act for the Union is contemplated.

question could not, or would not, accept his constitutional position as a Colonial officer appointed by and subordinate to the Ministry, and the dismissal of Lord Dundonald by the Canadian Government in 1904 revealed the fact that that officer, in his desire for efficiency, had practically attacked the Dominion Government.[1] The plan was then adopted by Act 4 Edw. VII. c. 23 of abolishing the command-in-chief and instituting a Militia Council with an Inspector-General, who might be a military officer of the United Kingdom or of Canada; and while this post was at first filled by Sir Percy Lake, it was then, on his retirement in 1910 after an unusually prolonged service, given to a Canadian officer, Brigadier-General Otter, while his place was filled by an officer of the British army. In the case of the Commonwealth something of the same sort happened; the attempt to maintain a post of general officer commanding broke down completely, and Act No. 14 of 1904, after the usual friction had ended with the retirement of General Hutton, substituted a Council of Defence, with an Inspector-General and a Military Board. A Council was also created with one member a British officer by Act No. 41 of 1906 by the New Zealand Government, but by the Act of 1910 its powers are transferred to the Commandant. Much more important, probably, has been the visit of Lord Kitchener above mentioned to both New Zealand and to Australia, and his advice, which led to the legislation of 1910 in either Dominion,[2] and the visit of Sir John French to Canada in 1910 in order to inspect the whole of the forces of the Dominion.[3] But Canada is in a very different position from

[1] See *House of Commons Debates*, 1904, pp. 4580–665; and cf. General Hutton's case, ibid., 1900, pp. 594 seq., 2671; *Sess. Pap.*, No. 91.

[2] See New Zealand *Parliamentary Debates*, cli. 760; *Parl. Pap.*, 1910, H. 19 A; 1911, H. 19; *Memorandum on the Defence of Australia*, by Lord Kitchener, February 10, 1910; Commonwealth *Parl. Pap.*, 1910, Nos. 48 and 59; *Annual Report* by Major-General Kirkpatrick, May 30, 1911; *Official Year Book*, iv. 1074–96.

[3] For his report see Canada *Sess. Pap.*, 1911, No. 35 a, with a report of General Lake (No. 35 b) on the steps taken to make the recommendation effective. He held that the volunteer basis was still legitimate, but that if

Australasia ; the Monroe doctrine and friendly relations with the United States diminish risks of war, and the French-Canadians dread militarism ; compulsory training is therefore not at present conceivable, though, in theory, all males from 18 to 60 are liable to be trained, and in war a levy *en masse* is possible. It is also provided that the Commander-in-Chief in the Mediterranean, an officer of high rank, shall have as a part of his functions the duty of visiting and advising Dominion Governments if they desire his advice at any time.[1]

Besides this should be mentioned the scheme for a general army staff called the Imperial General Staff, consisting of Imperial and Dominion officers. There is no attempt to control the Dominions, but it is hoped that the whole staff will in harmony work together at collecting intelligence, creating plans of campaign, and mastering all the thousand matters which constitute the intellectual preparation for war. It is the purpose to constitute branches of the Imperial General Staff in each Dominion ; the branch shall correspond direct with the Imperial General Staff at the War Office, and so be in close touch with it, and an officer from each Dominion is to be attached to the Imperial General Staff in the War Office. The General Staff in each Dominion shall be autonomous and in no way under the control of the Imperial General Staff, but the whole object of establishing the General Staff is to secure the advantages of co-operating. Officers of the Dominions, it is hoped, will also be attached at times to the War Office as part of the Imperial General Staff, and similarly the General Staff in the Dominions should consist in part of officers from the War Office and the Imperial army, so that there may be at home a staff well acquainted with the conditions of the Colonies and a staff in the Dominions well acquainted with the conditions of Imperial military preparations. This seems to offer as regards matters military by far the best chance of a suitable settlement of a method

it was to be effective training must be insisted upon and the proportions of the forces adjusted, and a definite line of policy fixed upon and acted on. He praised highly the Military College, as Major-General Edwards had done in 1889. See also *Canadian Annual Review*, 1909, pp. 275–88 ; 1910, pp. 585–95.

[1] See *Parl. Pap.*, Cd. 5019, 5598.

of co-operation.[1] Such staff branches have been organized in Canada, Australia, and New Zealand, and are in direct communication with the Imperial General Staff.

Advice in all matters of the military or naval preparations of the Dominions can be obtained from the Overseas Defence Committee or the more august Committee of Imperial Defence. The former, now affiliated to the latter, is much the older body, and it performs the important duty of advising on all matters of detail submitted to it, and of preparing questions for the consideration of the Committee of Imperial Defence. That body[2] which owes its constitution to the interest taken by Mr. Balfour in Imperial defence, is remarkable in being presided over by the Prime Minister, and its constitution is elastic, and allows of the presence of members of the Dominion Governments[3] when questions affecting the Dominions are concerned, and on these occasions the Secretary of State for the Colonies is present or is represented. In this Committee, combined with occasional Conferences such as that of 1909, would seem for the present at least to lie the mode of securing a certain amount of continuity in the defence policy of the Empire.

In general the local army Acts are based on the Imperial model, but differ considerably as to punishments, which are normally less severe. In time of war, however, the full rigour of the Imperial Acts prevails. Outside the limits of the Dominion the troops remain subject to Colonial legislation, if any; if not, they fall under the *Army Act*, in accordance with the express terms of s. 177 of that Act. But to this rule there is the exception that men sent for training to other forces now by Imperial and local legislation fall under the control of the Dominion or the United Kingdom, according to where they are serving at the time. Moreover, legislation has now been adopted by Australia and New Zealand in 1909 under

[1] See *Parl. Pap.*, Cd. 4948; 5335, p. 4.

[2] For practical purposes it seems to supersede the joint naval and military Colonial Committee established in 1890; see C. 5979, p. viii. Cf. *Parl. Pap.*, Cd. 2200; 3524, pp. 15–7; *Hansard*, ser. 4, cxxxix. 68, 619; cxlvi. 62; *House of Commons Debates*, viii. 337, 1382 seq.

[3] e. g. in 1911 defence matters were held over for discussion with the Ministers of Defence of Canada, Australasia, and the Union.

which when serving in other parts with Imperial troops the Imperial Act is to apply, and the *Army Act* is generally applicable under s. 71 of *Revised Statutes*, 1906, c. 41, to the Canadian forces, while in time of active service in Canada or the Commonwealth with Imperial troops the Governor-General on behalf of His Majesty may place the troops under the command of a senior officer of the regular army if deemed desirable. But in no case are the Dominion forces bound to serve beyond the limits of the Dominion without their consent, and all the troops employed at Suakim in 1885 and in the South African War were voluntarily enlisted. In every case if the citizen forces are called out, Parliament, if not sitting, must be summoned.

For the government of such forces on the voyage to and from South Africa and while in the Colonies there was some doubt as to the legal authority.[1] Hence in 1909–10 court-martial[2] warrants were issued to all the Governor-Generals and the Governor of New Zealand, giving power to convene and confirm general courts martial held within the Dominion for offences against the *Army Act*. This, it was explained, applied to offences committed by persons enlisted in the Dominion under the *Army Act*, or to offences committed by persons raised under a local Act but serving under the *Army Act*. Moreover, a Governor could issue a warrant to the senior officer in charge of troops embarked in the Dominion if subject to the *Army Act*, allowing him to convene and confirm district courts martial, which warrant would cease to have effect when the troops landed at their destination. For the return voyage the general commanding at the port of embarkation would give a warrant to the officer for the purpose of the journey.

§ 2. Naval Defence

The defence of the Dominions from external attack has never yet been laid upon them by the Imperial Government. The result is that in naval matters comparatively little

[1] Cf. New South Wales Act No. 12 of 1899; *Napier* v. *Scholl*, 1904 S. A. L. R. 73, at p. 88; Commonwealth Act No. 15 of 1909, s. 9.

[2] See New Zealand *Parl. Pap.*, 1910, A. 2, p. 47.

progress has been made in putting the Colonies in a condition of defence. Until 1910 Canada possessed nothing more than revenue vessels for her fishery service.[1] Newfoundland has only revenue cutters. South Africa has no war vessels of its own, nor has New Zealand. In Australia, however, various circumstances led to greater efforts being made for naval protection. The way in this matter was led by the Colony of Victoria.[2] The head-quarters of the Imperial naval forces on the Australian station was New South Wales, and Victoria felt open to attack as there was practically no permanent stationing of Royal Navy vessels in Victorian waters. The Heads were not fortified, and the large expanse of Port Philip and Hobson's Bay open to foreign cruisers called for a naval service for its defence. In the sixties, therefore, the beginnings of a naval service were created, and in 1885 the force attained its greatest efficiency, there being then in the possession of the navy a wooden frigate, one ironclad, two gunboats, and three torpedo-boats, to which in 1892 a first-class torpedo-boat was added ; but the force was considerably reduced in 1893, and at the time of federation the expenditure was reduced to £19,000 a year. In New South Wales there was never a substantial naval force ; a naval brigade was raised to serve as a reinforcement for the navy in case of need, and a light corvette, the *Wolverine*, was made over to the New South Wales Government. The force, however, was purely a quasi-civil body, and, though in 1885 two torpedo-boats were built, no further addition was made to the strength. In Queensland naval defence dated from 1884, two gunboats being commissioned for the defence of bays and rivers against attacks from merchant cruisers of the enemy. The *Gayundah*, one of these boats, was maintained in full commission, and a naval brigade was organized as in the case of

[1] Canada has exercised the sovereign right of 'hot pursuit' ; see *The Ship North* v. *The King*, 37 S. C. R. 385. Cf. New Brunswick Act, 1866, c. 2.

[2] For the history of the Australian Naval Forces see the *Official Year Book*, ii. 1084, 1085 ; iii. 1052 seq. In 1869 there was a proposition on foot for a naval force half paid for by the Colonies, to be stationed in Australasian waters ; see *Parl. Pap.*, C. 83, pp. 522 seq.

New South Wales. In 1893 the gunboats were put out of commission, but in 1899 the service was again expanded. South Australia, also in 1884, commenced naval defence. They secured the *Protector*, a heavily armed though small cruiser, specially designed for service in territorial waters, which was permanently commissioned with a three-fifths complement and exercised in every way as a ship-of-war of the Government. At the time of her arrival in the Colony the *Protector* was a vessel of substantial armament. In 1893 it was placed in commission in reserve, and the permanent crew and officers, excepting the Commander-in-Chief, engineer, and instructional staff, were retrenched. Tasmania had no naval force except a second-class torpedo boat, which was finally transferred to South Australia, and Western Australia had no naval force at all.

These naval forces were controlled entirely by the Governments of the Colonies under Colonial Acts. There could be no doubt as to the legislative powers of the Colonies to provide such forces for local defence. On the other hand, it was a question how far the Colonies were in a position to legislate with regard to matters occurring beyond the territorial limit, and, moreover, it was obviously important that there should be no doubt as to the falling of these vessels under Imperial control in any case of the undertaking of warlike operations. It was, however, after consideration decided to pass an Imperial Act, 28 & 29 Vict. c. 14, in 1865 relating to naval defence, which would permit the Imperial Government by Order in Council to take over a local force which the Colonial Government were ready to place at the disposal of the Imperial authorities, and, after such taking over the local force would fall to be regulated entirely by the Imperial authorities, and the men and officers would be governed by the Act for the time being in force with regard to discipline in the Royal Navy, and would fall under the terms of the *Naval Discipline Act*[1] (27 & 28 Vict. c. 109).

The important provisions of this Act were as follows :—

3. In any Colony it shall be lawful for the proper legislative authority, with the approval of Her Majesty in Council, from

[1] Amended by 47 & 48 Vict. c. 39 and 9 Edw. VII. c. 41.

time to time to make provision for effecting at the expense of the Colony all or any of the purposes following :

(1) For providing, maintaining, and using a vessel or vessels of war, subject to such conditions and for such purposes as Her Majesty in Council from time to time approves :[1]

(2) For raising and maintaining seamen and others entered on the terms of being bound to serve as ordered in any such vessel ;

(3) For raising and maintaining a body of volunteers entered on the terms of being bound to general service in the Royal Navy in emergency, and, if in any case the proper legislative authority so directs, on the further terms of being bound to serve as ordered in any such vessel as aforesaid :

(4) For appointing commissioned, warrant, and other officers to train and command or serve as officers with any such men ashore or afloat, on such terms and subject to such regulations as Her Majesty in Council from time to time approves :

(5) For obtaining from the Admiralty the services of commissioned, warrant, and other officers and of men of the Royal Navy for the last-mentioned purposes :

(6) For enforcing good order and discipline among the men and officers aforesaid while ashore or afloat within the limits of the Colony :

(7) For making the men and officers aforesaid, while ashore or afloat within the limits of the Colony or elsewhere,[1] subject to all enactments and regulations for the time being in force for the discipline of the Royal Navy.

4. Volunteers raised as aforesaid in any Colony shall form part of the Royal Naval (*Volunteer*) Reserve, in addition to the volunteers who may be raised under the Act of 1859 (*Naval Forces Act*, 1903), but, except as in this Act expressly provided, shall be subject exclusively to the provisions made as aforesaid by the proper legislative authority of the Colony.

5. It shall be lawful for Her Majesty in Council from time to time as occasion requires, and on such conditions as seem fit, to authorize the Admiralty to issue to any officer of the Royal Navy volunteering for the purpose a special commission for service in accordance with the provisions of this Act.

6. It shall be lawful for Her Majesty in Council from time to time as occasion requires, and on such conditions as seem fit, to authorize the Admiralty to accept any offer for the

[1] This power was one more extensive than could be exercised by a Colonial Legislature of its own power. In ss. 4 and 7 the words in italics are alternatives given by 9 Edw. VII. c. 19.

time being made or to be made by the Government of a Colony, to place at Her Majesty's disposal any vessel of war provided by that Government, and the men and officers from time to time serving therein ; and while any vessel accepted by the Admiralty under such authority is at the disposal of Her Majesty, such vessel shall be deemed to all intents a vessel of war of the Royal Navy, and the men and officers from time to time serving in such vessel shall be deemed to all intents men and officers of the Royal Navy, and shall accordingly be subject to all enactments and regulations for the time being in force for the discipline of the Royal Navy.

7. It shall be lawful for Her Majesty in Council from time to time as occasion requires, and on such conditions as seem fit, to authorize the Admiralty to accept any offer for the time being made or to be made by the Government of a Colony, to place at Her Majesty's disposal for general service in the Royal Navy, the whole or any part of the body of volunteers, with all or any of the officers raised and appointed by that Government in accordance with the provisions of this Act ; and when any such offer is accepted, such of the provisions of the Act of 1859 (*Naval Forces Act*, 1903), as relate to men of the Royal Naval (*Volunteer*) Reserve raised in the United Kingdom when in actual service shall extend and apply to the volunteers whose services are so accepted.[1]

8. The Admiralty may, if they think fit, from time to time by warrant authorize any officer of Her Majesty's Navy of the rank of captain, or of a higher rank, to exercise in the name and on behalf of the Admiralty, in relation to any Colony, for such time and subject to such limitations, if any, as the Admiralty think fit, any power exercisable by the Admiralty under this Act.

9. Nothing done under this Act by Order in Council, or by the Admiralty, or otherwise, shall impose any charge on the revenues of the United Kingdom without express provision made by Parliament for meeting the same.

10. Nothing in this Act shall take away or abridge any power vested in or exercisable by the Legislature or Government of any Colony.

The result of this Act is set out in a dispatch from the Secretary of State to the Governor of Queensland of November 17, 1884,[2] dealing with an offer made by the

[1] By s. 2 of 9 Edw. VII. c. 19 the Colonial Legislatures can provide for men being entered as bound to serve in the Royal Navy on emergency.

[2] *Parl. Pap.*, H. C. 125, 1884–5.

Colonial Government of a ship for service with the Imperial navy.

3. Early in this year when the gunboats built for the Government of Victoria were ready to leave England, application was made by the Agent-General for an Order in Council to place these vessels under the provisions of s. 6 of the *Colonial Naval Defence Act*, 1865, and thus enable them to acquire the status of vessels of war of the Royal Navy during the voyage to Melbourne.

4. The Law Officers of the Crown were consulted whether it was competent to Her Majesty to issue an Order in Council under s. 6 of the Act without issuing one under s. 3, and they advised in reply that s. 6 authorizes the Crown to accept for Imperial purposes vessels legally existing as Colonial armed vessels: and that it is, therefore, clear that such vessels must first obtain their status under s. 3 before s. 6 can be applied to them.

5. The Victorian Act, No. 389, styled the *Discipline Act*, 1870, and No. 417, to which Her Majesty's approval in Council had been obtained at the time of their enactment, provide that vessels placed in Commission by the Governor shall be under the enactments and regulations in force for the discipline of the Royal Navy. It was, therefore, possible for me to instruct the Governor to issue Commissions under those Acts, and upon my learning that this had been done, Orders in Council under s. 3 and s. 6 were issued.[1] In the absence of any similar Acts in Queensland, it was not possible to entertain the offer conveyed in your telegram of the 25th ultimo; it will, however, be a satisfaction to Her Majesty's Government, if, upon receipt of your dispatch and of the Act of the Legislature, it shall be found possible to meet the wishes of your ministers.

6. Before the Orders in Council of March 4 were issued, the Agent-General for Victoria offered to place the vessels at the disposal of Her Majesty for service in the Red Sea, so as to share in the active operations then in progress. The Law Officers were, thereupon, asked to advise as to the position which would be occupied by the officers and men in the event of this offer being accepted; and whether, having regard to the terms of their agreement, such acceptance would render the crews liable to active service against the enemy as men of the Royal Navy without their assent

[1] The Orders were dated March 4, 1884, and provide for the raising, &c., of the naval force, and its being placed at the disposal of the Admiralty.

previously obtained. Upon the latter question, the Law Officers were clearly of opinion that the crews would not be so liable; and they thought that under the terms of their engagement the crews were only bound to navigate the ship on the same conditions and subject to the same discipline as merchant seamen. And, further, as the vessels had not as yet been within the limits of the Colony, and were not then manned by crews entered for the service of the Colony, they were of opinion that very serious difficulties might arise from their employment in any warlike operation. It may be desirable that your Government should take this advice into consideration when engaging officers or men for service in any armed vessel belonging to the Colony.

7. Colonial armed vessels whose services are accepted under s. 6 of the *Colonial Naval Defence Act* are to be deemed to all intents vessels of war of the Royal Navy. But in the event of a Colonial vessel of war making a long passage, such as a voyage from England to Australia, in the course of which she would pass through several stations, meeting ships of war commanded by officers of various ranks, it is evident that many difficulties would arise which would render it very inconvenient, and probably impossible as the law now stands, to consider her as to all intents a vessel of war of the Royal Navy. She would be unprovided with the Navy signals, books, or regulations; the relative rank of the officers in command is not provided for, and although the ship's company would be under the *Naval Discipline Act*, the captain would not sit on courts martial. It was, consequently, thought advisable that the Victorian vessels, which had already left England before March 4, should continue their voyage under the blue ensign and pendant for which Admiralty warrants had been granted to them.

8. By s. 80 of the Queen's Regulations for the Navy it is provided that Colonial ships of war maintained by a Colony under the *Colonial Naval Defence Act*, 1865, shall wear the blue ensign with the seal or badge of the Colony in the fly thereof and a blue pendant. The Lords of the Admiralty would always be ready to grant the necessary warrant for any such vessel, such warrant being the proper evidence of her right to bear these colours. The pendant is the symbol of a ship of war, and foreign powers have been informed that vessels bearing these colours are entitled to all the privileges of vessels of war.

9. You will observe that in what I have said sea-going vessels only are in question, some portion of whose duties

would be discharged beyond the limits of Colonial waters; and I thought it advisable to invite the Admiralty to make a further reference to the Law Officers respecting Colonial vessels intended for harbour defence or other local services to be performed entirely within the waters of a Colony. An opinion was received that Colonies possessing responsible government are at liberty independently of an Act of the Imperial Parliament to provide and equip armed vessels for harbour defence, and police and other like purposes within, and their use being limited to, the waters of such Colonies respectively; and the Lords Commissioners of the Admiralty have informed me that they would be prepared to sanction the use of the blue ensign (with the badge of the Colony thereon) and the blue pendant by vessels armed and fitted for harbour defence, police, or other like purposes within the territorial waters of the Colony, provided that such vessels are commanded by officers holding Commissions from the Governor or Government of the Colony.

10. I have thought that the above information may be of service to your ministers, and I shall be glad if you will communicate this dispatch to them.

Later Orders in Council of December 30, 1884, and January 24, 1885, were issued to approve the maintenance of the *Protector* by the South Australian Government under Act. No. 307, 1884, and of the *Gayundah* by the Queensland Government under Act No. 27 of 1884. But in the main the further vessels equipped by the Colonies were equipped under the general legislative power of the Colonies for local defence. In 1900 under ss. 6 and 7 of the Act of 1865 a gunboat, its crew, and volunteers, were accepted for service in China.

In 1887 some further steps were taken to secure the defence of Australia.[1] It was then agreed at the Colonial Conference of that year, that it would be right and proper for the Colonial Governments to make a contribution towards the cost of the maintenance on the Australian Station of an important force, in addition to what forces would normally be stationed there in the interests of Imperial defence. It was agreed that an auxiliary squadron should be created to consist of five fast (7,500 horse-power) third-class cruisers

[1] See Imperial Act 51 & 52 Vict. c. 32; Quick and Garran, *Constitution of Commonwealth*, pp. 116, 562; *Parl. Pap.*, C. 5091, pp. 489–511.

of 2,575 tons, and two torpedo gunboats of 750 tons and 4,500 horse-power, and its special function was the protection of the floating trade in Australasian waters. Three cruisers and one gunboat were to be kept permanently commissioned, and the rest in reserve in Australasian ports, but ready for commission whenever occasion might arise. The vessels were to remain within the limits of the Australasian station, which was defined in the agreement, and were to be employed in time of peace or war within such limits, in the same way as the Sovereign's ships of war are employed, and beyond those limits only with the consent of the Colonial Governments. The prime cost of the vessels was to be defrayed from Imperial funds, but the Colonial Governments paid interest on the prime cost at 5 per cent. up to a maximum of £35,000 a year, and were to contribute not more than £91,000 a year for the annual maintenance of the vessels. The agreement was confirmed by Acts of the Colonial Parliaments and of the Imperial Parliament; it was to last for ten years, and thereafter to continue until determined on two years' notice. The agreement was further extended after the Colonial Conference of 1902,[1] and was then ratified by Act No. 8 of 1903 in the Commonwealth of Australia, to which in 1900 the control of naval forces passed on federation, and in New Zealand by Act No. 50, 1903. The new agreement provided, after modification by a later arrangement, for one first-class armed cruiser, three second-class cruisers, and five third-class cruisers, and a Royal Naval Reserve of 25 officers and 700 seamen and stokers. One ship was to be kept in reserve, three to be partly manned for drill purposes for training the royal naval reserve, and the remainder to be kept in commission and fully armed. Australasians were, as far as possible, to man the three drill-ships and one other vessel, but they were to be officered by Royal Naval and Royal Naval Reserve officers. One-half of the annual cost of maintenance was to be borne by the Dominions, but not more than £200,000 was to be paid by Australia and than £40,000 by New Zealand, sums

[1] See *Parl. Pap.*, Cd. 1299; Commonwealth Act No. 8 of 1903.

which have fallen very considerably short of half of the expenditure.

There was difficulty in passing the Commonwealth legislation [1] to give effect to the agreement, and a strong feeling developed itself in Australia in favour of the assumption of full responsibility for the defence of Australian ports and dockyards, and the protection of coasting trade. The Imperial Defence Committee expressed the opinion that the British fleet guaranteed Australia against invasion in force, and also against attack by a considerable squadron of armoured vessels, though admitting that the exigencies of war might require the withdrawal of the Australian Imperial squadron, and that Australia could not be guaranteed against attack by armoured commercial raiders, up to four in number, but such damage as they could inflict would not be of more than secondary importance. It was considered, however, by the naval advisers of the Commonwealth, that while the damage so inflicted might be of secondary importance, it might nevertheless be of moment to Australia, and Mr. Deakin's Government decided to commence building an Australian navy. Discussions arose with the Imperial Government as to the important question of the control of the navy in time of peace and in time of war. The Australian Government desired to retain the constitutional power of placing the navy under the control of the Admiralty in time of war, while in time of peace they were desirous that the navy should remain completely under their own control.[2] The position presented obvious difficulties, inasmuch as there was, to begin with, a doubt as to the limits of the power of the Commonwealth Parliament to legislate effectively for the government of the naval forces while beyond the territorial waters of the Commonwealth.[3] It was true that

[1] It was questioned by Mr. Higgins whether such expenditure was within the legal powers of the Commonwealth; see *Parliamentary Debates*, 1903, pp. 1997, 1998; Harrison Moore, *Commonwealth of Australia*,[2] p. 553.

[2] See *Parl. Pap.*, Cd. 3523, pp. 128 seq., 469 seq.; 3524, pp. 38–71; Commonwealth *Parl. Pap.*, 1901, No. 52, A. 12; 1905, No. 66; 1906, Nos. 44, 81, 82; 1907–8, Nos. 6, 143, 144; 1908, Nos. 6, 37.

[3] Cf. the dictum of Martin C.J. (N.S.W.) in *The Brisbane Oyster Fishery Co.* v. *Emerson*, Knox, 80, at p. 86.

the power of the Commonwealth extended by s. 51 (vi) of the Constitution to legislate for naval defence, and it could not be urged successfully that this legislation was meant to apply solely within the limits of territorial waters. Moreover, it was clear that s. 10 of the *Colonial Naval Defence Act*, 1865, supported the view that there was no Imperial restriction on Colonial legislation in this regard other than such restriction as might be inherent in all Colonial legislation. Moreover, the Commonwealth Constitution Act, s. 5, expressly authorized the application of the laws of the Commonwealth to all vessels, the Queen's ships of war excepted, whose first port of clearance and port of destination were in the Commonwealth. That section had authoritatively been interpreted [1] by the High Court of the Commonwealth to apply to cases of such voyages to whatever part of the world they extended, and in particular if they extended to the Western Pacific, India, or similar regions, and therefore apparently the laws of the Commonwealth would be in force on Commonwealth Government vessels. There was, however, an obvious difficulty in the exception of the Queen's ships of war, but it was clearly doubtful whether this could be considered as intended to apply to naval forces raised by the Commonwealth Government. Moreover, it was clear that there had always been a distinction between the two sets of laws. The naval vessels of the Commonwealth since the *Defence Act*, No. 20 of 1903, had been raised and maintained under the Commonwealth law; the State Acts ceased to be in force; the State Governments had put only a part of their forces under the operation of the *Colonial Naval Defence Act*, and the agreement of 1887 expressly recognized the continued autonomous existence of the local fleets. It is true that, according to the indications of the *Statutory Rules and Orders in force on December* 31, 1906, the Orders in Council of March 4, 1884, and June 24, 1885, under the Act of 1865 authorizing the commissioning of three vessels of war of Victoria and authorizing the commissioning of

[1] *Merchant Service Guild of Australasia* v. *Archibald Currie & Co. Proprietary Ltd.*, (1908) 5 C. L. R. 737; above, pp. 1197–9.

certain vessels of Queensland, are still in force together with Orders in Council of the same dates under s. 6 of the Act, authorizing the Admiralty to accept offers of the services of the Victorian ships and a Queensland gunboat, and an Order of August 7, 1900, authorizing the Admiralty to accept the offer of the Government of South Australia to place the *Protector* at Her Majesty's disposal.[1] But it is very doubtful whether since the *Defence Act* of 1903 of the Commonwealth, which certainly does not contemplate the continuance of these Orders in Council, the virtual repeal of the State Acts, and the cesser of the power of the State Governments which were a necessary part of the Order in Council, the Orders in Council have any validity. But, however that may be, it is clear that all the forces of the Commonwealth except the vessels expressly referred to are beyond doubt or question solely within the control of the Commonwealth Government.[2] The difference between two classes of vessels of war is pointed out clearly in the Navigation Bill of the Commonwealth of Australia, which distinguishes, in s. 2, between the King's navy and the navy of the Commonwealth. It may well be that in law, whether under the general power in s. 51 (vi) of the Constitution, or under s. 5 of the Constitution Act, the Federal Parliament has already power to enforce its regulations on board its own vessels wherever in the world they may be. It would not, of course, have power to enforce these regulations on its naval forces while on land outside the Commonwealth; if it were necessary to obtain that power an Imperial Act would be required. But although the Commonwealth might have power so to legislate, it would be obvious that if men were to be interchanged, as was contemplated by Mr. Deakin, with the Imperial Government, it would be necessary for

[1] This was in connexion with the war in China. These orders are really spent as they were only for a brief period: but the Order of December 30, 1884, which is still possibly valid, is omitted.

[2] The vessels affected by these Orders never did include even the larger part (though probably they did once include the more useful part) of the Australian Colonial naval forces. In 1910 of fourteen vessels in use four only were covered by the Orders, and the ocean-going *Parramatta* and *Yarra* are not included.

some joint system to be arranged. Moreover, there are obvious difficulties in the case of an Imperial and a Colonial fleet being together in time of peace, though in time of war the placing of the navy under the control of the Admiralty would ensure the disappearance of such difficulties.

More important, of course, was, and is, the question of international law—how far it was possible compatibly with the maintenance of the unity of the Empire to have a fleet separate from the Imperial fleet. It was true that the same problem had been raised with regard to military forces, but, with the exception of Canada, Colonial military forces had not been in a geographical position to commit acts of aggression on foreign soil, and in the case of Canada there was no probability, if, for no other reason than the formidable power of the United States, that any act of aggression would take place.[1] On the other hand, ships of war moved freely, and possibilities of difficulty were present especially in connexion with the Western Pacific, unless the control of the Imperial Navy could in some manner be ensured. No final arrangement was come to while Mr. Deakin's Government was in office ; the Admiralty made proposals for the constitution of a quasi-independent Australian Navy, leaving for further discussion the arrangements to secure uniformity in training and command in the two forces, and the full control of the Imperial power in international matters both in war and in peace.

During the Colonial Conference of 1907, Mr. Deakin discussed with Lord Tweedmouth and the heads of the Admiralty the question of Australian naval defence. On October 16, 1907, he addressed to the Governor-General a dispatch explaining the views of the Commonwealth Government in this matter. In that dispatch the suggestion was pressed that, instead of a contribution of money, the share of the duty of the naval defence undertaken by Australia should take the form of a contribution of Australian seamen.

[1] Macleod's case indeed seems to contradict this rule, but that was before full responsible government, and in fairness the act was merely one of self-defence against foreign invaders ; see Hall, *International Law*,[5] pp. 314, 315.

The proposal then made by Mr. Deakin was to substitute for the present Commonwealth subsidy 1,000 seamen—Australians if possible—to be paid by the Commonwealth, for service in the navy on the station, at an estimated cost of about £100,000 per annum to the Commonwealth, the remainder of the subsidy to be applied by the Commonwealth to obtaining submersibles or destroyers, or similar local defences. At the same time, two cruisers of P. or a superior class, manned by 400 of the 1,000 Australians, should be retained on the coast in peace or war. In addition, the Commonwealth would provide in 1907 £250,000 for harbour and coast defences, and £50,000 for the fortification of harbours.

The Admiralty,[2] in reply, pointed out that at the Colonial Conference no proposal had been made for the permanent retention of cruisers in Australian waters, and that while anxious to meet the wishes of Mr. Deakin, they were not prepared to depart from the decision taken up at the Conference, that while they did not themselves propose to cancel the agreement with Australia and New Zealand, yet if the Commonwealth Government desired to cancel the agreement and to substitute other arrangements, they were willing to advise and assist in carrying out a scheme for local defences, always provided that such a scheme did not involve a definite obligation to maintain British vessels permanently in Australian waters. They also regarded it as essential that complete control by the Commander-in-Chief over the local forces in time of war must be secured to the Imperial Government.

After further correspondence, Mr. Deakin requested that the Admiralty should draw up a scheme to provide for the utilization of Australian seamen in local defences, and for connexion of the Australian flotilla with His Majesty's fleets of war. This scheme was forwarded to Australia in August, 1908. It was based on the principle that the Commonwealth Government should provide and maintain nine submarines and six destroyers in Australian waters; that this flotilla should be manned by officers and men of the Royal Navy, as

[1] *Parl. Pap.*, Cd. 4325, pp. 1–3. [2] Ibid., pp. 3, 4, 6.

many as possible of whom should be men recruited for the Royal Navy in Australia; that the officers (79) and men (1125) should serve under the King's Regulations for the navy, but that the direction of the fleet should be entrusted to the Minister of Marine of the Commonwealth, who should control the fleet so long as it remained in Australian waters, or while passing from one point to another point of Australian territory, including Papua. If passing beyond Australian waters, the fleet should fall under the control of the senior naval officer, but by arrangement with the Commander-in-Chief it would be possible to dispatch the fleet on training cruises. The estimated total annual cost was just under £350,000, while the capital cost was estimated at £1,277,500. It would be understood that in time of war the fleet would be placed by the Commonwealth Government under the control of the Commander-in-Chief.[1]

The Government of New Zealand in 1908 decided to increase the subsidy to the squadron on the present basis to £100,000 a year from October 1, 1908, and this proposal was approved by the Dominion Parliament (Act No. 225). Recognizing how important it was for the protection of the Empire that the navy should be at the absolute disposal of the Admiralty, the Dominion Government did not desire to suggest any conditions as to the location of the ships, as they were confident that the truest interests of the people of New Zealand would be best served by having a powerful navy under the constant control of the Admiralty.

A totally new position as to naval defence was developed by the proceedings in the Imperial Parliament in 1909, when great concern was expressed even by ministers[2] as to the rivalry of the foreign fleets. The result was the spontaneous offer of a 'Dreadnought,' or, if necessary, two, to the Imperial Navy by the Government and Parliament of New Zealand,[3] and this was followed by an important telegram from the two Governments of New South Wales and Victoria, offering to provide one if the Commonwealth Parliament

[1] See *Parl. Pap.*, Cd. 4325, pp. 48–56.

[2] *House of Commons Debates*, ix. 955 seq. [3] *Parl. Pap.*, Cd. 4948, p. 1.

should fail to act.[1] The Commonwealth Government then sent in a set of proposals for the creation of a fleet unit to operate in Australian waters and to be under the general control of the Commonwealth Government, but they offered automatic control in time of war through the operation of sealed orders. The offer was made in the following telegram, dated April 15, 1910 :—[2]

Prime Minister of the Commonwealth has asked me to submit to your Lordship, for consideration of His Majesty's Government, the following memorandum on the question of Naval Defence :—

Whereas all the Dominions of the British Empire ought to share in the most effective way in the burden of maintaining the permanent naval supremacy of the Empire :

And whereas this Government is of opinion that, so far as Australia is concerned, this object would be best attained by encouragement of naval development in this country so that people of Commonwealth will become a people efficient at sea and thereby better able to assist United Kingdom with men as well as ships to act in concert with the other sea forces of the Empire :

The views of the present Government, as a basis of co-operation and mutual understanding, are herewith submitted :—

(1) The Naval Agreement Act to continue for the term provided for ;

(2) The Commonwealth Government to continue to provide, equip, and maintain the defences of naval base for the use of the ships of the Royal Navy ;

(3) In order to place Australia in a position to undertake the responsibility of local naval defence, the Commonwealth Government to establish a Naval Force ;

(4) The Commonwealth Government to provide ships constituting the torpedo flotilla and maintain them in a state of efficiency, wages, pay, provision, and maintenance of officers and men ;

(5) The sphere of action of the Naval Force of the Commonwealth to be primarily about the coast of Commonwealth and its territories ;

(6) The administrative control of the Naval Force of the

[1] *Parl. Pap.*, Cd. 4948, p. 3. For the dissent of Queensland, see *Parliamentary Debates*, 1910, pp. 2464 seq.

[2] Ibid., pp. 3, 4.

Commonwealth to rest with the Commonwealth Government. The officer commanding to take his orders from the Commonwealth Government direct, proper sequence of command by officers appointed by the Commonwealth being maintained. The forces to be under naval discipline administered in same way as in the Royal Navy ;

(7) Whilst employed about the coast of Commonwealth or its territories, whether within territorial limits or not, the vessels forming the Naval force of the Commonwealth to be under the sole control of Commonwealth. Should the vessels go to other places, the said vessels to come under the command of the naval officer representing the British Government, if such officer be senior in rank to the Commonwealth officer. Provided that, if it be necessary to send these vessels or any of them on training cruises outside the waters referred to, arrangements shall be made with the Lords Commissioners of the Admiralty through Naval Commander-in-Chief on the Australian Station ;

(8) In time of war or emergency or upon a declaration by the Senior Naval Officer representing British Government, that a condition of emergency exists, all the vessels of the Naval Force of the Commonwealth shall be placed by the Commonwealth Government under the orders of Lords Commissioners of the Admiralty. The method by which the vessels shall come under the orders of the Senior Naval Officer would be by furnishing each Commander of an Australian vessel with sealed orders and instructions to the effect that upon the declaration to him by the Senior Naval Officer representing British Government that a state of war or emergency exists, such sealed orders shall thereupon be opened and, in pursuance of their provisions, he shall thereupon immediately place himself under the orders of the Senior Naval Officer representing British Government ;

(9) It is, however, to be understood that if the services of any of the Coast Defence vessels be desired in seas remote from Australia, the approval of the Commonwealth Government shall first be obtained to their removal ;

(10) To ensure the highest efficiency, the Lords Commissioners of the Admiralty to be asked to agree to the Naval Commander-in-Chief on the Australian Station making, at request of the Commonwealth Government, periodical inspection of the vessels of the Naval Force of the Commonwealth, Naval School of Instruction, and Naval Establishment ;

(11) Lords Commissioners of the Admiralty to be asked

also to approve of the service on the flotilla of such officers of the Royal Navy as may be mutually agreed to for service as Instructors and Specialist officers and to receive officers of the local flotilla for instruction at the torpedo, gunnery, and other schools in the United Kingdom ;

(12) Lords Commissioners of the Admiralty to be asked to give opportunities from time to time for officers and men specially selected by the Commonwealth being attached to battle fleets or torpedo flotillas in European waters for special instruction, the expense to be borne by Commonwealth ; and

(13) For special facilities to be given, by arrangement with the Naval Commander-in-Chief on the Australian Station, for the vessels of the flotilla being exercised in conjunction with the ships of the Royal Navy on the Australian Station, subject to the command of such combined exercises being held by the Naval Commander-in-Chief of the Royal Navy on the Australian Station.

In concluding his memorandum, Prime Minister assures me that Commonwealth Government would highly appreciate the receipt, at earliest possible moment, of the views of His Majesty's Government on the foregoing proposals.—DUDLEY.

This was followed by an invitation from the Secretary of State to the Governor-General and Governors of the Dominions, sent in a telegram of April 30, 1909[1] :—

The Prime Minister of the United Kingdom, as President of the Imperial Conference, has desired me to ask you to convey the following message to the Prime Minister of [the Commonwealth of Australia] [the Dominion of New Zealand] [Cape Colony] [Newfoundland].

'It will, no doubt, be within your knowledge that on March 29 the Canadian House of Commons passed a Resolution to the following effect :—

' *Resolution begins :* That this House fully recognizes the duty of the people of Canada as they increase in numbers and wealth to assume in larger measure the responsibilities of National Defence.

' The House is of opinion that, under the present constitutional relations between the Mother Country and the self-governing Dominions, the payment of regular and periodical contributions to the Imperial Treasury for naval and military purposes would not, so far as Canada is concerned, be the most satisfactory solution of the question of defence.

[1] *Parl. Pap.*, Cd. 4948, pp. 5–7.

'The House will cordially approve of any necessary expenditure designed to promote the speedy organization of a Canadian Naval Service in co-operation with, and in close relation to, the Imperial Navy along the lines suggested by the Admiralty at the last Imperial Conference, and in full sympathy with the view that the Naval supremacy of Britain is essential to the security of commerce, the safety of the Empire, and the peace of the world. The House expresses its firm conviction that whenever the need arises the Canadian people will be found ready and willing to make any sacrifice that is required to give to the Imperial authorities the most loyal and hearty co-operation in every movement for the maintenance of the integrity and honour of the Empire. *Resolution ends.*

'I understand that the Dominion Government proposes that its Defence Ministers should come here at an early date to confer with the Imperial Naval and Military Authorities upon technical matters arising upon that Resolution.

'His Majesty's Government have also before them recent patriotic proposals made by Australia and New Zealand, proposals most highly appreciated by the Mother Country, and demanding very cordial and careful consideration both as to principle and detail.

'I desire, therefore, to commend to you the following important suggestion, namely, that a Conference of representatives of the self-governing Dominions convened under the terms of Resolution I of the Conference of 1907, which provides for such subsidiary conferences, should be held in London early in July next. The object of the Conference would be to discuss the general question of Naval and Military Defence of the Empire with special reference to the Canadian Resolution, and to the proposals from New Zealand and Australia to which I have referred.

'I assume that as the consultation would be generally upon technical or quasi-technical naval and military matters the other governments of the self-governing Dominions would elect to be represented as in the case of Canada by their Ministers of Defence, or failing them by some other member of the Government assisted by expert advice, but it is entirely for the Government of [the Commonwealth] [New Zealand] [Cape Colony] [Newfoundland] to decide the precise form of its representation.

'The Conference would, of course, be of a purely consultative character, it would be held in private, and its deliberations would be assisted by the presence of members of the

Committee of Imperial Defence, or of other expert advisers of His Majesty's Government. I am addressing a similar message to the other members of the Imperial Conference.'

I am strongly of opinion that an early confidential exchange of views between His Majesty's Government and the Governments of His Majesty's self-governing Dominions beyond the seas will be of the greatest mutual advantage, and I therefore trust that your Prime Minister and his colleagues will see their way to adopt the proposal.

[*To Newfoundland only:* At present juncture[1] I presume your Prime Minister will suspend definite answer until the elections are over.]

[*To Cape only:* I recognize that at the present time the Government of Cape Colony in common with the other South African Governments which are contemplating the probability of early union may not be in a position to take an active part in such a Conference, but the absence of any representatives of the South African Dominions from its deliberations would be a serious detriment to the completeness of the Conference.

The Conference met on July 29 and sat several times. Before it came together a coalition in Australia had changed the composition and the policy of the Commonwealth Government and had led to the decision to offer assistance in the form of a 'Dreadnought'.

A statement was made in the House of Commons by the Prime Minister, the Right Honourable H. H. Asquith, M.P., on August 26, in these terms:—[2]

The Conference, which has just concluded its labours, was convened under the terms of Resolution I of the Conference of 1907. In the invitation sent by His Majesty's Government at the end of April to the Governments of the Dominions, it was stated that the object of the Conference would be to discuss the general question of Naval and Military Defence of the Empire, with special reference to recent proposals from New Zealand and Australia, and to the Resolution passed on March 29 by the House of Commons of the Dominion of Canada. It was further stated that the Conference would be of a purely consultative character, and that it would be held in private. It follows that all

[1] Viz. a general election, the House of 36 members being equally divided.

[2] *House of Commons Debates*, ix. 1310-3.

resolutions come to and proposals approved by the Conference which has now been held must be taken, so far as the delegates of the Dominions are concerned, to be *ad referendum*, and of no binding force unless and until submitted to their various Parliaments.

I should add, in special reference to the delegates from South Africa, that they did not feel themselves in a position, in regard to either naval or military defence, to submit or to approve positive proposals until the Union of South Africa was an accomplished fact. With this preface I will briefly summarize the main conclusions of the Conference in regard, first to Military, and next to Naval, Defence.

After the main Conference at the Foreign Office, a Military Conference took place at the War Office, and resulted in an agreement on the fundamental principles set out in Papers which had been prepared by the General Staff for consideration by the Delegates. The substance of these Papers (which will be included among the Papers to be published) was a recommendation that, without impairing the complete control of the Government of each Dominion over the military forces raised within it, these forces should be standardized, the formation of units, the arrangements for transport, the patterns of weapons, &c., being as far as possible assimilated to those which have recently been worked out for the British Army. Thus, while the Dominion troops would in each case be raised for the defence of the Dominion concerned, it would be made readily practicable in case of need for that Dominion to mobilize and use them for the defence of the Empire as a whole.

The Military Conference then entrusted to a Sub-Conference, consisting of military experts at head-quarters and from the various Dominions, and presided over by Sir W. Nicholson, acting for the first time in the capacity of Chief of the Imperial General Staff, the duty of working out the detailed application of these principles.

I may point out here that the creation early this year of an Imperial General Staff, thus brought into active working, is a result of the discussions and resolutions of the Conference of 1907. Complete agreement was reached by the members of the Sub-Conference, and their conclusions were finally approved by the main Conference and by the Committee of Imperial Defence, which sat for the purpose under the presidency of the Prime Minister. The result is a plan for so organizing the forces of the Crown wherever they are that, while preserving the complete autonomy of each

Dominion, should the Dominions desire to assist in the defence of the Empire in a real emergency their forces could be rapidly combined into one homogeneous Imperial Army.

Naval defence was discussed at meetings of the Conference held at the Foreign Office on August 3, 5, and 6. The Admiralty memorandum which had been circulated to the Dominion representatives formed the basis of the preliminary conferences.

The alternative methods which might be adopted by Dominion Governments in co-operating in Imperial Naval Defence were discussed. New Zealand preferred to adhere to her present policy of contribution ; Canada and Australia preferred to lay the foundation of fleets of their own. It was recognized that in building up a fleet a number of conditions should be conformed to. The fleet must be of a certain size, in order to offer a permanent career to the officers and men engaged in the service ; the personnel should be trained and disciplined under regulations similar to those established in the Royal Navy, in order to allow of both interchange and union between the British and the Dominion Services ; and with the same object, the standard of vessels and armaments should be uniform.

A remodelling of the squadrons maintained in Far Eastern waters was considered on the basis of establishing a Pacific fleet, to consist of three units in the East Indies, Australia, and China seas, each comprising, with some variations, a large armoured cruiser of the new *Indomitable* type, three second-class cruisers of the *Bristol* type, six destroyers of the *River* class, and three submarines of ' C ' class.

The generous offer, first of New Zealand and then of the Commonwealth Government, to contribute to Imperial naval defence by the gift each of a battleship was accepted with the substitution of cruisers of the new *Indomitable* type for battleships—these two ships to be maintained one on the China and one on the Australian station.

Separate meetings took place at the Admiralty with the representatives of Canada, Australia, and New Zealand, and general statements were agreed to in each case for further consideration by their respective Governments.

As regards Australia, the suggested arrangement is that with some temporary assistance from Imperial funds the Commonwealth Government should provide and maintain the Australian unit of the Pacific fleet.

The contribution of the New Zealand Government would be applied towards the maintenance of the China unit, of

which some of the smaller vessels would have New Zealand waters as their head-quarters. The New Zealand armoured cruiser would be stationed in China waters.

As regards Canada, it was considered that her double seaboard rendered the provision of a fleet unit of the same kind unsuitable for the present. It was proposed, according to the amount of money that might be available, that Canada should make a start with cruisers of the *Bristol* class and destroyers of an improved *River* class—a part to be stationed on the Atlantic seaboard and a part on the Pacific.

In accordance with an arrangement already made, the Canadian Government would undertake the maintenance of the dockyards at Halifax and Esquimalt, and it was a part of the arrangement proposed with the Australian representatives that the Commonwealth Government should eventually undertake the maintenance of the dockyard at Sydney.

Papers containing all the material documents will be laid before Parliament in due course, and, it is hoped, before the conclusion of the Session.

In accordance with these resolutions Canada has purchased two cruisers from the Imperial Government, and has passed an Act in 1910 (c. 43) to regulate its naval forces. It was to build in nine years four cruisers and six destroyers. Australia has acquired two destroyers, and has placed orders for two cruisers in England, and another destroyer and a cruiser will be constructed forthwith, being put together in Australia. The others will be built locally. A change of Government in 1910 resulted in no change of policy save that the loan contemplated in Act No. 14 of 1909 has been abandoned (Act No. 6 of 1910). New Zealand has undertaken by Act No. 9 of 1909 to defray the cost of the cruiser of the *Indomitable* pattern being constructed for the squadron in China, and the orders for the first-class cruisers for New Zealand and Australia were placed in 1910.

Admiral Sir R. Henderson visited Australia in 1910–11 and reported on March 1, 1911, on the position. His recommendations include the establishment of a unit which will first aid in the maintenance of the supremacy of the British navy, and in the second place help to protect Australian forts and bases.

It should ultimately in 1933 consist of 8 armoured and 10 protected cruisers, 18 destroyers, 12 submarines and 4 dépôt and repair ships, involving a capital cost of £23,290,000, an annual charge after completion of £1,226,000 for maintenance, 15,000 men for manning at a cost of £2,226,000, £40,000,000 for docks, and a total annual vote of £4,794,000. The plan seems bold and worthy of full consideration, but the number of men required is a serious consideration at a time when Australian prosperity renders it hard to attract men to a life subject even to the most modified naval discipline.

The Commonwealth [1] Act, No. 30, empowers the Governor-General in Council to appoint a Board of Administration for the naval forces to be called the Naval Board, and to appoint and promote officers of the naval forces, and to appoint an officer to command the whole or any portion of the naval forces. The appointment or promotion of an officer is not, however, to create a civil contract between the King or the Commonwealth and the officer, a provision necessary in maintaining the right of the Crown or the Commonwealth to dispense summarily with the services of any officer. Officers are not to be promoted except provisionally, unless they pass the prescribed examinations within a prescribed time, which must not exceed eighteen months after appointment, but the requirement of this section may be dispensed with by the Governor-General in Council in the case of persons who are officers of the King's regular naval forces. Appointments shall be during pleasure, but an officer's commission shall not be cancelled except for cause and after he has been called upon to answer in his own defence. Except in time of war, an officer may resign his commission on giving not less than three months' notice. The seniority of officers shall be determined by regulations. Provision is made for appointment or promotion without examination for distinguished service, or for marked ability and gallantry on active service. Naval colleges and instructional establish-

[1] See *Parliamentary Debates*, 1910, pp. 4489–95 (Sen. Pearce), 5667–1601; 1650–3 (Mr. Hughes), 1653–7 (Mr. Cook), 1657–62, 1671, 1672. Act No. 18 appropriates £2,590,000 for naval defence.

ments may be established for the purpose of imparting education in the various branches of naval science.

The naval forces shall be divided into two branches called the Permanent Naval Forces and the Citizen Naval Forces. The former shall consist of officers and seamen bound to continuous naval service ; the latter forces are divided into the Naval Reserve Forces, consisting of officers and seamen not bound in time of peace to continuous naval service, and who are paid for their services, and the Naval Volunteer Reserve Forces, consisting of officers and seamen not bound in time of peace to continuous naval service, and who are not ordinarily paid for their services in time of peace. Members of the existing Naval Militia Forces are transferred by the Act to the Naval Reserve Forces, and members of the Naval Volunteer Forces and the Naval Reserve Forces under the *Defence Act* are transferred to the Naval Volunteer Forces. Except as provided in the *Defence Act*, 1903–10, as regards training, the naval forces shall be raised and kept by voluntary enlistment only for a period which shall not be less than two years. Enlistment is permitted in any part of the King's Dominions, subject to the law in force in that part. If the termination of the period of service of a member of the naval forces falls in time of war he shall not be entitled to be discharged until the end of the war. Except in war, a seaman of the Citizen Naval Forces may obtain his discharge before the expiration of the period for which he has enlisted subject to three months' notice and payment of a sum not exceeding £2 if a member of the Reserve Forces, and of £1 if a member of the Naval Volunteer Reserve.

The permanent naval forces are liable to continuous naval service, and shall at all times be liable to be employed on any naval service, including active service. The Citizen Naval Forces are not liable in time of peace to continuous naval service, and shall only be liable for active service when called out by proclamation, though they may voluntarily enlist.

Members of the naval forces may be required to serve for training or any naval service either within or without the

limits of the Commonwealth. The Governor-General in Council may, for the purpose of naval service or training, place any part of the naval forces on board any ship of the King's navy or in any naval training establishment or school in connexion with the navy. The *Naval Discipline Act* and the King's Regulations and Admiralty Instructions for the the time being in force in relation to the King's naval forces shall, subject to the Act and to any modifications and adaptations prescribed by the regulations made under the Act, apply to the naval forces. Whenever the Commonwealth naval forces are acting with the King's naval forces, the command shall, subject to any Imperial Act or Regulation, devolve upon the senior naval officer present, and any part of the Commonwealth naval forces may be placed under the command of any officer of the King's naval forces.

Provision is made that cadets liable for training under the *Defence Act* shall be trained as prescribed in the regulations and shall be subject to the Act, and while undergoing training be deemed to be members of the Citizen Naval Forces.

In addition to the powers given in the *Defence Act* the Governor-General in Council may build ships and construct docks, shipyards, foundries, &c., for naval purposes, and employ persons in a civil capacity in connexion therewith. The Governor-General in Council may accept the transfer to the Commonwealth naval forces of any vessel of the King's naval forces or of the naval forces of a Dominion, or of any officers or seamen of such forces, and may transfer to such forces vessels, officers, or seamen of the Commonwealth naval forces for such period and subject to such conditions as the Governor-General in Council thinks desirable. Subject to the conditions of transfer the officers and seamen so transferred shall fall under the regulations of the force to which they are transferred.

Provision shall be made for the widow and family, or for the man himself if any member of the naval forces is killed on active service or on duty or dies or becomes incapacitated from earning his living from wounds or disease contracted on active service, and the payment of an annuity or gratuity

to members of the permanent naval forces who have retired on account of age or infirmity is contemplated.

The Governor-General in Council is given a general power to make regulations for carrying out the purposes of the Act, and such regulations may provide penalties not exceeding three months' imprisonment or £20 in case of pecuniary penalties.

In the Cape and Natal naval preparations have been confined to money contributions and naval reserve forces.[1]

§ 3. The Control of the Dominion Fleets

In the case both of the Canadian Act of 1910 (c. 43) and of the Commonwealth Act, No. 30 of 1910, the principle is laid down that the fleets shall be under the complete control of the Government of the Dominion and of the Commonwealth respectively. On the other hand, it is clearly contemplated that it will be possible for Canada and Australia to place their forces at the disposal of the Imperial Government. Thus it is provided by s. 23 of the Canadian Act of 1910[2] that in the case of an emergency the Governor in Council may place at the disposal of His Majesty for general service in the Royal Navy the naval service of any part thereof, any ships or vessels of the naval service, and the officers and seamen serving in such ships or vessels, or any officers or seamen belonging to the naval service. When this is done, if Parliament is not in session and is not separated by such adjournment or prorogation as will expire within ten days, a proclamation shall issue for a meeting of Parliament within fifteen days, and Parliament shall accordingly meet and sit upon the day appointed by such proclamation, and shall continue to sit as if it had thus adjourned or prorogued until the same day. There is a similar provision in the Australian *Defence Act*. It is contemplated that the forces shall be governed by the *Naval Discipline Act*, 1866, and any

[1] See Cape Acts No. 20 of 1898; 14 of 1902; Natal Act No. 5 of 1903. The Naval Volunteers were to become members of the Royal Naval Volunteer Reserve; see Natal Act No. 33 of 1907.

[2] For Canadian views on the naval defence question, see *Canadian Annual Review*, 1909, pp. 49–61, 77–80, 87–99, 226, 227; 1910, pp. 139–218.

amending Imperial Acts in the King's Regulations and Admiralty Instructions in so far as such Acts, regulations, and instructions are applicable, and except in so far as they may be inconsistent with the Canadian Act or regulations made under the Act. The Governor in Council is empowered to direct who shall perform in Canada the duties vested by the Imperial Acts or regulations or instructions in the Admiralty or in any other body or officer in the United Kingdom.

During the course of the passing of the Act there was much discussion in the Canadian Parliament as to whether sufficient was being done by the Dominion Government, and as to whether they were not taking steps which would lead directly to involving the Dominion in foreign wars in which they had no interest, and out of which it was desirable that they should remain.[1] On the one side it was contended that, in effect, Canada was attempting to claim for itself a position of neutrality when Great Britain was at war. On the other hand it was argued that under the proposal of the Government Canada would be, against its will and against the wishes of the people, compelled to share in all the conflicts in which the Imperial Government might be engaged. The position adopted by the Prime Minister was clear and simple.[2] He held that it was impossible for the Dominion Government to be indifferent to the wars in which Great Britain might from time to time be engaged. If Great Britain were at war every power would be at liberty to attack Canada, and Canada must be prepared to do its share in defending itself. On the other hand, the Prime Minister insisted that it was not intended in any way to leave the disposal of the forces of Canada automatically to the Imperial Government.

In any case it would be open to Canada to decide, as far as aggressive action was concerned, what degree of co-operation it would afford against a foreign attack. It can

[1] See *House of Commons Debates*, 1909–10, pp. 1732 seq., 2952 seq., 3210 seq., 3575 seq., 3987 seq., 4316 seq., 4535 seq., 4848 seq., 5107 seq., 7393 seq., 7590 seq.

[2] See also his speeches at Montreal on October 10, 1910 (Montreal *Herald*, October 11, 1910), and on the reassembling of Parliament on November 21, 1910; *House of Commons Debates*, pp. 57 seq.

hardly be said that the views of the Prime Minister were altogether favourably received in the Dominion. An election in the Arthabaska and Drummond division of Quebec which followed shortly saw the Government candidate defeated, a most unusual and surprising event, which showed that the anti-military spirit of the French Canadians was still strong, but a subsequent provincial election showed that the Government had not lost its hold on the province as completely as opponents prophesied. Moreover, both in Parliament and in the country the leaders of the Opposition in Quebec, Messrs. Monk,[1] Bourassa,[2] and Lavergne, attacked the policy of the Dominion as involving the Dominion in needless wars.[3] On the other hand, the regular Opposition, under Mr. Borden, only criticized the Government on the ground that it was not prepared to co-operate in all British wars, and that it was decided on the policy of a Canadian fleet in place of co-operating by an immediate contribution towards the cost of the Imperial Navy pending the creation of an allied fleet which on constitutional grounds Mr. Borden advocated.

By the Australian Act it is provided that the Governor-General may transfer to the King's naval forces, or to the naval forces of any part of the King's dominions, any vessel of the Commonwealth naval forces and any officers or seamen of those forces for such period and subject to such conditions as he thinks desirable. Subject to these conditions officers and seamen transferred shall be subject to the laws and regulations governing the naval forces to which they may be transferred. The Governor-General is also empowered to accept transfers of vessels of the King's naval forces or the naval forces of another Dominion, and of officers and seamen of such forces who will then fall under the rules affecting the naval forces of the Commonwealth. The *Naval Discipline Act* and the King's regulations and Admiralty instructions for the time being in force shall apply to the Commonwealth naval forces subject to any modifications

[1] *House of Commons Debates*, 1909–10, pp. 1769 seq., 2991 seq.
[2] See e. g. *Le Devoir*, September 18, 1911.
[3] *House of Commons Debates*, 1909–10, pp. 1738 seq., 2979 seq.

prescribed by regulations under the Australian Act, and when vessels of the Australian and Imperial fleets are co-operating the command shall, subject to any Imperial Act or regulations, devolve on the senior officer, and any part of the Commonwealth naval forces may be placed under the command of any officer of the King's naval forces.

In both cases the legislation passed contemplates the Acts having extra-territorial effect, and it is indeed clear that without such effect the provision of navies proper would be meaningless. The regulations which were adequate for the Government forces which did not move beyond the limits of the Colony are quite out of place in connexion with large vessels such as those which are now possessed by Canada and the Commonwealth. It is not clear whether the legislative power for Parliaments covers the whole sphere of operations, but the defect, if any, can be remedied by Imperial legislation. More important is the fact that the position of Dominions with naval forces raises at once a fundamental question with regard to the defence and responsibility for foreign policy of the Empire, a question which is not raised in equal degree by the problem connected with military forces only.[1] In the first place, there is much greater chance of international incidents arising from the operations of a force which can go freely over the world; and in the second place, the existence of these navies is of more immediate importance in defence matters to a country which depends on its naval strength. It is impossible not to recognize that the participation of the Dominions in naval defence must ultimately result in their sharing to some degree in the direction of the foreign policy of the Empire.[2]

[1] See Commonwealth *Parliamentary Debates*, 1910, pp. 4489–96, 5597 seq., where Mr. Pearce, as Minister of Defence, recognizes the new problems presented. The Dominion Government have decided not to accept the proposed assistance from the Imperial Government, and have repealed the Naval Loan Act No. 14 of 1909, and are going to finance the scheme by direct taxation and in part by the proceeds of a note issue (see Acts Nos. 6, 11 and 14 of 1910).

[2] See also Part VIII, chap. iii.

CHAPTER XI

HONOURS

§ 1. Titles of Honour

The prerogative of honour is essentially one for the personal exercise of the Crown.[1] It is clear that the value of an honour depends entirely upon its being considered as a mark of royal favour, and that possession of an honour which was conferred merely by local authority would be of practically no value whatever. Moreover, if an honour were conferred locally it would only be valid within the local limits, and outside those limits it would have only such value as might be accorded to it by courtesy in other countries. On the other hand, it is the privilege of the Crown to confer honours which are valued throughout the Empire.

Accordingly honours are never conferred in virtue of local Acts. It has, indeed, often been questioned whether an honour could be so conferred. It hardly seems possible to deny in the abstract that an Act could be passed empowering a Governor to confer titles of honour, but that such an Act should be approved by the Crown may be regarded as being at present impossible, and certainly there is no case on record of the passing or the approval by the Crown of such an enactment.

The value of conferring honours on persons in the Colonies was insisted upon by Lord Elgin[2] when Governor-General

[1] For the prerogative, cf. 31 Hen. VIII. c. 10, quoted by Lord Macnaghten in *Earl Cowley* v. *Countess Cowley*, [1901] A. C. 450, at p. 456.

[2] See Walrond, *Letters and Journals of Lord Elgin*, p. 114. It may be noted that even a Governor-General cannot 'dub' a man Knight; it is a power reserved for the Crown alone; even the Duke of Connaught on his visit to open the Union Parliament in 1910 did not receive the power. On the other hand, Governors-General and Governors are allowed to perform investitures. Cf. *Attorney-General for Dominion of Canada* v. *Attorney-General for Province of Ontario*, [1898] A. C. 247, at p. 252; *in re Bedard*, 7 Moo. P. C. 23.

of the United Province of Canada. He then pointed out that the removal of the connexion which had formerly existed between the Mother Country and the Colonies through the exercise of patronage and commercial protection might be replaced in some measure by the judicious grant of titles and other marks of the royal favour, showing the continuance of a direct connexion between the Crown and the Colony. He then recommended strongly that the appointments in question should not be made on the advice of Colonial ministers, though they could be made on the advice of the Governors and of Imperial ministers.[1] That position still, on the whole, may be said to remain good; that is to say, marks of the royal favour are bestowed not on the responsible advice of ministers, but on the advice of a minister of the Crown in the United Kingdom, whose opinion, of course, is obtained in part from the Governor and in part from the Ministry of the Colony. It is clear that if the honours are to be of Imperial validity they must be granted by an Imperial authority. It would be possible for His Majesty if the honours were of local validity to confer one which should be valid in Canada or in Australia on the advice of a Canadian or an Australian Ministry, but as the honour cannot be confined in space, the advice must be that of an Imperial minister who bears the responsibility of each appointment and must inform himself as best he can on the subject by what means he finds available to him. Obviously the Imperial Officer in the Dominion or State, the Governor-General or Governor, must be one source of information, and a very important one. Obviously too, due weight must be given to the Ministry of the day. But it is clear that the weight of the opinion of the Ministry will differ very considerably in different cases. If the honour which it is proposed to confer is one for political services, their opinion

[1] Cf. Sir J. Macdonald's view, Pope, ii. 237 seq., and Goldwin Smith, *Canada*, pp. 155 seq.; Molteno, *Sir John Molteno*, i. 341. Higinbotham thought that honours should be given by the Governor on the advice of his ministers and the Colonial Parliaments; apparently he meant life peerages. A motion against the grant of honours was unsuccessful in the New South Wales Assembly in 1882; see *Debates*, pp. 460–72.

must be of much more value than if it is one for matters lying outside the political world, as, for instance, eminence in art, in literature, in science, in philanthropy, and so forth. In 1879 Sir George Grey indignantly attacked the Imperial Government for granting, without his knowledge or advice, Knighthoods to two members of the Opposition party of New Zealand.[1] The members were no doubt worthy of the honour, but he contended that it was unheard-of for the Crown to confer honours on Opposition members without the sanction, and in this case without even the knowledge of the Premier, the transaction having taken place directly between the Governor and the recipients of the honours in question.

The Secretary of State replied declining to accept the arguments urged by Sir G. Grey, but it should be noted that in practice since that time the principle of conferring honours on the Opposition or on public servants does not appear to have been adopted except on the advice of the Ministry of the day.

In the matter of making certain appointments to the Legislative Council of New Zealand by the Atkinson Ministry before its retirement, Lord Onslow reported that the action, though strictly in harmony with the British custom, had not been favourably received in New Zealand, and that it would not be repeated, and this statement is certainly correct.[2]

But in notifying the conferment of the high honour of Privy Councillor upon Sir Charles Tupper the Governor-General on November 11, 1907, expressly informed him that the honour had been recommended by Sir Wilfrid Laurier, the Leader of the Government.[3]

In the case of the Commonwealth, difficulties have arisen. In Canada the provinces fall directly under the control of

[1] See New Zealand *Parl. Pap.*, 1879, A. 9; 1880, A. 2. Todd, *Parliamentary Government*,[1] p. 239, note 1, censured Sir G. Grey, but in this instance he was substantially right; such a proceeding could not now occur. The Federation honours were granted in the case of Canada spontaneously (Pope, i. 331, 332), and the Union honours in South Africa embraced all parties. Sir O. Mowat's honour is said to have been spontaneous; Biggar, ii. 601 seq.

[2] See *Parl. Pap.*, H. L. 214, 1893–4, p. 12; cf. Rusden, *New Zealand*, iii. 33, n.

[3] *Canadian Annual Review*, 1908, p. 25.

the Federal Government, and therefore honours for men of distinction in the provinces must be recommended by the Governor-General, while in Australia the State Governments have always claimed that the honours must be recommended by the State Governors, and that they should not be in any way subject to the concurrence of the Governor-General.

On the other hand, it has been contended that it is essential that the Crown should have the advice of its principle representative in the Commonwealth, so as to be in a position to weigh the respective claims of the various candidates put forward by State Governors, and stress is laid on the fact that the recommendations of the State Governors are not as has been thought in the states, submitted in any way to the approval of the Commonwealth Government. But it is natural for the State Governments to feel that the Governor-General must be influenced by federal opinion in forming his judgement of the merits of individuals, of whom in many cases in the remoter states he can have not the slightest personal knowledge, and it is clear that dissatisfaction in Australia is by no means yet a matter of the past.[1] The federal Labour Ministry declines to propose honours.

The honours which are conferred, are, as a rule, the Privy Councillorships,[2] which have been conferred on the Premiers present at the Conferences of 1902,[3] 1907 and 1911, and occasionally on other persons, as, for example, on the Chief Justice of South Australia, Sir Samuel Way, when he was made in 1897 a member of the Privy Council and a member

[1] See Harrison Moore, *Commonwealth of Australia*,[2] p. 350. The states were not consulted when the style of Lord Mayor was conferred upon the Mayors of Sydney and Melbourne. In 1911, on the other hand, the Commonwealth and State supported the request of Adelaide for the title, which was, however, refused; *Canadian Gazette*, lvii. 498; Adelaide *Chronicle*, June 24, 1911.

[2] Sir J. Macdonald desired that members of the Canadian Privy Council should be styled 'Right Hon.', but this was refused; see Pope, i. 391; ii. 4.

[3] Hence Sir E. Barton is a Privy Councillor. Mr. Deakin has declined the honour, but Sir W. Laurier, Sir J. Ward, General Botha, Sir R. Bond, Mr. (now Sir L. S.) Jameson, Sir J. Gordon Sprigg, Sir A. Hine, Mr. Merriman, Mr. Fisher, Sir E. Morris, Sir R. Cartwright, and Sir F. Moor of Natal, have accepted it.

of the Judicial Committee, in order to strengthen it in dealing with Australian appeals. The same dignity has been conferred upon the Chief Justice of the High Court of the Commonwealth, Sir Samuel Griffith, who was made a Privy Councillor in 1901.

In the case of the Union of South Africa, the Chief Justice has been created a Baron, and the Chief Justice of Canada is usually created a member of the Privy Council, besides receiving the honour of Knighthood, or the K.C.M.G., as Administrator of the Government.

In addition to the Privy Councillorship, the highest honour which can be conferred on any British subject, the normal modes of rewarding services to the Empire in the Dominions, are those conferring membership of one of the classes of St. Michael and St. George, which was instituted originally in 1818, in connexion with services to the Crown in Malta and the Ionian Islands. The Order as now constituted [1] consists of the Sovereign, who is chief of the Order, the Grand Master, who is the Prince of Wales, and Knights Grand Cross, not to exceed 100, of which number 30 are assignable for foreign services and are disposed of by the Secretary of State for Foreign Affairs. There are 300 Knights Commanders, of which 90 are disposed of for foreign services, and 725 Companions, of which number 217 are assignable for foreign services.[2] The entry to the Order is as a general rule through the lowest class, the Companionships, and the great majority of appointments to the high Orders conform to this rule ; in several cases, however, the possession of a C.B. or of a Knighthood has been considered sufficient to justify the grant of a K.C.M.G., without requiring the grant of a C.M.G. The grant of a G.C.M.G. without a previous grant is extremely rare, but Sir Wilfrid Laurier was granted a G.C.M.G. in 1897, as a signal mark of the royal favour and a recognition of his great services to Canada.

In addition, the creation of Knights Bachelor is not rare. Agents-General and Judges normally receive this honour,

[1] Under various royal warrants.

[2] There are honorary members also, foreigners so appointed.

Chief Justices in all the larger places as almost a matter of course, and the K.C.M.G. is hardly ever conferred on a judge unless he also administers the Government from time to time, as in the case of the Chief Justice of Canada, although this rule is not absolutely without exception, as in the case of Sir Pope Cooper, C. J. of Queensland, but he would normally have been expected to administer, and his case is therefore not normal. The Knighthood [1] also is an appropriate mode of recognizing the services of other than official persons. Minor officers in the Civil Service are provided for by the Imperial Service Order, instituted by His late Majesty King Edward. This Order can be given either for long and meritorious service or for service of special distinction, and it has been conferred on many distinguished public servants in the Dominions. Appointments to other Orders of Knighthood are rare in the extreme, though they are not unknown.

Such as they are, they are in the main confined to the Order of the Bath, which has been granted in a good many cases to military officers for Colonial services, and in some cases to Colonial military officers. Membership of the Royal Victorian Order has been conferred in certain cases, but only to persons who have come into personal contact with royalty.[2]

Governors also receive honours as a matter of course. The State Governors in Australia and the Governor of Newfoundland receive the K.C.M.G. as a rule, and the G.C.M.G. is appropriate to the Governors-General of Canada,

[1] Baronetcies are rare; Sir S. Way in 1899 is an exception; also Sir E. Clouston, Canada, in 1908, Sir C. Tupper in 1888, and Sir J. Ward in 1911, a creation which evoked a bill brought in by a member of the opposition in New Zealand to forbid the use there of hereditary titles. Many Australian statesmen (e. g. Mr. Gillies, Mr. Higinbotham, Mr. Jenkins) have refused to be put forward for any honour. Peerages in such cases as those of Lord Strathcona, 1897, Lord Mountstephen, 1891, and Lord de Villiers, are very rare, and in the first two cases the recipients reside in England. The Crown has also recognized one French barony in Canada and a Maltese nobility. An hereditary Upper House with baronetcies was proposed in Canada in 1791 (31 Geo. III. c. 31, ss. 6–11), but not carried out; cf. Shortt and Doughty, *Docs. rel. to Const. Hist. Canada*, p. 665.

[2] e. g. a C.V.O. was given to Mr. J. Pope, Under-Secretary of State, Canada, on the occasion of the Prince of Wales's visit in 1907.

Australia, and the Union, and the Governor of New Zealand, who are usually peers. The Order of the Michael and George is also bestowed on members of the Colonial Office, but the C.B. is frequently granted to them also, and occasionally the Permanent Under-Secretary has received a peerage on retirement, a laudable practice.

Recommendations for honours are made by the Secretary of State for the Colonies in the case of all recommendations for the membership of the Order of St. Michael and St. George, and other distinctions for Colonial services.

§ 2. The Prefix 'Honourable'

In addition to honours in the form of titles, the use of the prefix 'Honourable' has now been definitely regulated. It is adopted on instructions from the Queen by the Privy Councillors and by the Senate of Canada, and by established practice it is borne by the members of the Legislative Councils[1] and the Executive Councils in all the self-governing Dominions. In those cases where membership of the Executive Council does not cease on retirement from active office, namely in the Dominion of Canada, the Commonwealth of Australia, Victoria, and Tasmania, formerly in the case of the Cape and presumably in the Union, the title is borne for life. In other cases ex-members of the Executive Council[2] may, if they have served for three years, or if in the office of Premier for one year, be granted by special permission of the Crown the right to retain the title after having ceased to hold office. These titles, which were originally of local application only, were given validity throughout Her Majesty's Dominions by a notice published in the *London Gazette* of June 16, 1893, and by a circular dispatch of November 14, 1896, which laid down that members of the Legislative Councils of Colonies under responsible government might be permitted after not less than ten years'

[1] Also by the Speaker of the Assembly. The Australian Senators do not use it.

[2] The ex-members have precedence as a rule next after members, even if the title 'Honourable' is not continued to them.

service to retain for life the title of 'Honourable' on retirement, if recommended for this distinction by the Governor.[1] In the Canadian provinces the Executive Councillors, President of the Legislative Council, and Speaker of the Assembly bear the title, but only for their period of office.

In the case of judges on retirement it was decided by the Secretary of State by dispatches of August 29, 1877, and October 31, 1878,[2] to permit them to retain the title of 'Honourable' within the Colony with precedence next after the judges of the Courts from which they had retired. This decision evoked from Sir George Grey[3] another violent protest, and he argued that it was improper that the Crown should confer a distinction to be borne within a Colony only. The Secretary of State declined to admit this contention, and it was not until 1911 that the practice of recognizing the title throughout the Empire was adopted.[4] Moreover, when the title 'Honourable' was conferred on all the members of the first Parliament of the Commonwealth as a signal mark of the exceptional character of the institution of the Commonwealth, it was expressly laid down by the dispatch of March 23, 1904, that it should be confined within the limits of the Commonwealth itself, a decision which has caused some dissatisfaction among those entitled to the use locally.[5]

[1] The President of the Council and the Speaker of the Assembly may retain it after three years' service on the recommendation of the Governor under a dispatch of March 10, 1894. See for all this South Australia *Parl. Pap.*, 1910, No. 54, p. 61. In the Canadian Provinces those entitled to it are given it on retirement by courtesy; see *Canadian Annual Review*, 1905, p. 185.

[2] Victoria *Legislative Assembly Journals*, 1877–8, App. B, No. 10; Canada *Statutes*, 1879, p. xli.

[3] New Zealand *Parl. Pap.*, 1878, A. 1, pp. 15–18.

[4] Ibid., 1910, A. 2, p. 74.

[5] Commonwealth *Parl. Pap.*, 1904, No. 21. In 1911, when Union in South Africa had extinguished many provincial honours, special permission to retain the title 'Honourable' was given to various persons by the King on January 1. Honours are now conferred twice yearly, January 1 and June 3. It is the established practice in Canada for the Judges of the Supreme Court to be styled 'his Lordship' in official documents.

§ 3. Salutes, Visits, Uniforms, and Medals

The salutes to be paid to officers in Colonial Governments are formally laid down in Nos. 144–7 of the *Colonial Regulations*. Governors are also authorized to sanction such salutes as may have been customary, and also such as they may deem right and proper at religious ceremonies, and further to cause the usual salutes to be fired at the opening and closing of the Houses of Parliament, but these salutes are in no case to exceed nineteen guns. It is customary on all such occasions for guards of honour of the local forces to be provided, and for the National Anthem to be played.[1]

Provision is also made in Nos. 156–61 of the *Colonial Regulations* with regard to official visits between naval officers and Governors and Lieutenant-Governors. The principle is that the Governor shall always receive the first visit from the senior officer in command, but a Lieutenant-Governor pays the first visit to a flag officer or Commodore, 1st class, who is a Commander-in-Chief. Special rules are laid down as to the payment of return visits and other details.

According to the regulations approved by the King, uniforms[2] of the first class are assigned to the Governors-General of Canada and Australia, the six states of the Commonwealth and New Zealand, and to the Governor-General of the Union of South Africa. The Governor of Newfoundland is only entitled to a uniform of the second class, which is also granted to Lieutenant-Governors and Cabinet Ministers of Canada, the Commonwealth of Australia, New Zealand and the Union of South Africa. The civil uniform of the third class is assigned to members of the Ministries in the states of the Commonwealth and in Newfoundland, to members of the Privy Council of the Dominion of Canada, who are not Cabinet Ministers, and

[1] This applies also to the Lieutenant-Governors of the Provinces, as was admitted by Lord Kimberley in a dispatch of November 7, 1872; see Ontario *Sess. Pap.*, 1873, No. 67; Lefroy, *Legislative Power in Canada*, pp. 101, 102.

[2] See *Colonial Regulations*, Nos. 163–70. A correct description of the various uniforms has been prepared and published with royal approval.

to official members of the Councils of other Colonies. The uniform of the fourth class may, subject to the sanction of His Majesty, obtained through the Secretary of State on the recommendation of the Governor, be worn by heads of principal departments who are not Executive Councillors, and the uniform of the fifth class may be worn by heads of subordinate departments and chief assistants in the principal departments.

The sanction of the King is required to wear a uniform when tenure of office has ceased, and such sanction needs the recommendation of the Governor and the approval of the Secretary of State. The uniform in each case must be that which has actually been worn by the officer during his tenure of office.

Governors who, when appointed, are Admirals or Generals, wear their naval or military uniform during their tenure of office, while other Governors wear the civil uniform of their class, but with the sanction of the Secretary of State, Governors who are not military officers may wear the uniform of the Lord-Lieutenant on occasions of reviews, inspections of forces, and similar ceremonies in the Colonies. A special state undress uniform has been invented for Colonial use on certain occasions.

The wearing on official occasions of medals is only allowed in the case of medals conferred by the royal authority or by a legal power in the Dominions.[1] The acceptance and wearing of medals from foreign potentates is regulated by rules approved by the King.[2] The inconvenience of the Imperial authorities dealing with all cases of grant of medals has been simplified by the practice of empowering by royal warrant

[1] *Colonial Regulations*, No. 143. It is a question whether a Governor-General or Governor could without royal authority, under the powers given in the Defence Acts of the Dominions, make regulations allowing the grant of medals valid locally. It is sufficient to say that this has not yet been done in any case since Governor Bowen of New Zealand created a medal in 1869 which was approved *ex post facto* by the Queen (*Parl. Pap.*, C. 83, pp. 42, 190; Rusden, iii. 547).

[2] Ibid., App. 5.

Governors to grant naval and military decorations on conditions approved by the Admiralty and War Office.[1]

§ 4. Precedence

Precedence is, as a rule, not regulated by legislation, and can be expressed in any form that is thought fit by the royal authority, whether by letters patent or by warrant, or by royal instructions, or by the signification of His Majesty's pleasure through the Secretary of State.

Thus, for example, the precedence of the Puisne Judges of the Supreme Court of Canada was regulated by one dispatch of October 31, 1878, and it was altered and considerably modified by another dispatch of November 3, 1879. Moreover, the tables of precedence which now regulate precedence in the Colonies have as a general rule been drawn up and formally approved by the Crown; if they have not been formally approved they have been sanctioned by practice and custom, and in the absence of special instructions from the King, the precedence can be regulated by the Governor, not in virtue of the automatic exercise of the prerogative, but in virtue of the *Colonial Regulations*.

A General Table of Precedence is laid down in *Colonial Regulations*, No. 138, but the general table is varied considerably in each of the Dominions.[2] It is provided also in Regulation No. 142 that members of the Royal Family take precedence next after the Governor of the Colony, and that persons entitled to official precedence in the United Kingdom or in foreign countries or in any particular Colony are not entitled as of right to the same precedence elsewhere. In the absence of any special instructions from the King the precedence of such persons will be determined by the Governor.

[1] See e. g. New Zealand *Parl. Pap.*, 1902, A. 1, p. 26; 1903, A. 2, p. 10; 1910, A. 2, p. 72; Royal Warrant, May 21, 1895.

[2] The approved list for Canada, as settled in 1893, will be found in the *Colonial Office List*, 1904, p. 479. That for the Commonwealth was published in the Commonwealth *Gazette*, December 30, 1905; that for the Union in the *Gazette*, September 30, 1910. For Sir J. Macdonald's views, cf. Pope, ii. 240, 330, 331. The question of consular precedence has been raised in Canada recently; see Sir W. Laurier's views, *House of Commons Debates*, 1909–10, pp. 853–5; 1910–1, pp. 973 seq.

British subjects, *other than Colonial officials*, enjoying in the United Kingdom precedence by right of birth or by dignity conferred by the Crown, cannot[1] lose such precedence while either temporarily or permanently residing in a Colony. This regulation must, however, be understood as subject to any special provisions in tables of precedence approved by the Crown, and it cannot be said to be acted upon generally in the self-governing Dominions, which naturally attach importance to the precedence in the Dominion itself, and not to the artificial precedence conferred by birth in the United Kingdom.

The precedence of bishops has been a matter of considerable variation. Up till 1847 a bishop of the Roman Catholic Church was not supposed to be addressed officially in the Colonies by the style appropriate to his rank, but on November 20 of that year, in view of the passing of legislation in the Imperial Parliament recognizing the bishop as entitled to precedence next after the bishop of the orthodox Church, the Governors of Colonies were informed that they could accord the usual official style to Roman Catholic bishops and others, but for a long time it was still the rule that they took rank after the bishops of the Established Church in England.[2] This is now, however, completely obsolete, and archbishops and bishops take rank usually by courtesy according to the date of consecration; archbishops in all cases taking rank above bishops.[3] The position by which the English Church was given preferential rank became impossible after 1865, when the plan of creating bishops in

[1] This is contrary to No. 26 of the Commonwealth list, which makes it a matter of courtesy, and the Colonial Regulation must be deemed only to be binding when no other rule already exists. The words in italics are not in the edition of 1911, but must be deemed still binding.

[2] See the Duke of Newcastle's dispatch, May 3, 1860; South Australia *Parl. Pap.*, 1871, No. 115.

[3] The Moderator of the Presbyterian Church is sometimes given a similar position. In Canada the bishops figure in the table of precedence, in Australia not, but *de facto* they may receive a courtesy precedence, and their precedence even in the Crown Colonies is a courtesy one. As a matter of fact, in Canada the heads of the Presbyterian and other Churches are also given a courtesy precedence; *House of Commons Debates*, 1910–1, pp. 973 seq.

the Colonies by letters patent and conferring upon them jurisdiction of any kind was definitely and finally abandoned. It was then clear that all bishops must be treated alike and denied precedence or accorded precedence on like grounds, but the new order was not established generally until the nineties.

It has become the practice of late to vary the rule by which members of the Royal Family are given precedence next after the Governor of a Colony. Though this was observed on the occasion of early visits paid by royalty to the Colonies and to India, the Duke of York, when he visited Australia to open the Commonwealth Parliament in 1901, took precedence before the Governor-General. On the other hand, in New Zealand, which he also visited, he had not any such precedence. But on the occasion of the Prince of Wales's visit to Canada in connexion with the Tercentenary celebrations in 1907, he was given by dispatch precedence over all persons in the Dominion of Canada, including the Governor-General, and when the Duke of Connaught was sent in 1910 to South Africa to open the first Parliament of the Union, he was likewise given precedence by letters patent over all persons in South Africa.

The general regulation of precedence by statute has practically never taken place, but it has been regulated in the case of the Judges in Australia by the Royal Charters of Justice and local Acts. For example, the Royal Charter of Justice of 1823 for New South Wales, which was issued under the statutory authority given by the Act 4 Geo. IV. c. 96, gave the Chief Justice of New South Wales precedence immediately after the Governor of the state. This charter reserved full power to the Crown to repeal its provisions, but the Constitution Act of 1855 maintained the provisions of the existing Act subject to being altered by the authority which could change them. The precedence of the Chief Justice could thus be, and was on a vacancy in 1910 altered by instructions from the King,[1] so as to give the Admiral the usual precedence

[1] That a provision of a local Act could be repealed by the prerogative is impossible, and so the Victoria Act, No. 1142 of 1890, s. 11, and the Tasmania Act, 19 Vict. No. 23, giving precedence to the Chief Justice next after the Lieutenant-Governor, and Puisne Judges next after the Chief

above the Chief Justice. But in Victoria and Tasmania the Chief Justice and the Puisne Judges still retain their exceptional position.

In the case of Newfoundland, the Charter of Justice of 1825, which was issued under the authority of the Act 5 Geo. IV. c. 67, gives the Chief Justice and the judges precedence after the Governor for the time being, excepting all such persons as by law or usage take place in England before the Chief Justice of the Court of King's Bench. The result of that provision is that the Chief Justice takes rank after the Prime Minister, if a Privy Councillor, but before a Prime Minister, who is not a Privy Councillor, although in 1905 a precedence was granted to the Prime Minister of England which placed him immediately after the Archbishop of York. The New Zealand table was altered in 1903 to give the Premier precedence over the Chief Justice, and the Union table of 1910 gives him a similar precedence.

An attempt was made in 1871 in South Australia to take away the precedence of bishops as it then existed,[1] South Australia having always been a particularly democratic and anti-clerical community. The Bill was reserved and never received the royal assent, which was refused on the ground that precedence was a matter especially for the King to regulate by the prerogative and not suitable for consideration in an Act of Parliament, and that it was not right to deprive the existing bishops of their precedence without their consent. On an address being adopted in 1872 in favour of change, it was promised that on no account would future bishops be granted precedence without the approval of the Colonial Government.[2]

Justice respectively, could not be changed save by law. This is not a case where express words are needed to bar the prerogative.

[1] They were placed before all Colonial officers, just as in Canada they follow the Lieutenant-Governor, who represents the Sovereign, and so they were placed in the provisional Commonwealth table.

[2] *Parl. Pap.*, 1871, No. 115; 1872, Nos. 61 and 68; *Journals*, 1872, pp. 194, 230; *Debates*, 1871, pp. 486, 656–63, 785–800, 887–91; 1872, 717–28, 830–45, 1021–4. In Victoria in 1868 an address to the same effect was adopted in respect of the revised *Colonial Regulations* of 1867; see *Debates*, vi. 816–23, 1101, 1102. A hint was given in a dispatch of September 16, 1872, that the clergy should relinquish their precedence.

In the Commonwealth the question of precedence is rendered peculiarly difficult by the fact that each state has a precedence list, and that the Commonwealth has a general precedence list, which naturally assigns to Commonwealth officials a higher precedence than the states can be expected to give them, and the result is that according as the entertainment is Commonwealth or state, the precedence differs substantially. In practice trouble is saved by state officials who do not care for the precedence accorded to them in the Commonwealth table remaining away from functions given by the Commonwealth.[1]

Wives of officials in the Colonies as a general rule take rank with their husbands.

Among themselves the Dominions may now reasonably be ranked in order of the date of creation of the present status. Thus Canada, constituted a Dominion in 1867 (July 1), Australia a Commonwealth in 1901 (January 1), and New Zealand a Dominion since September 28, 1907, by a proclamation of September 9, 1907, rank above the Union of South Africa, constituted in 1910 (May 31), and below all is Newfoundland, which still retains in official use the term Colony in its formal documents such as Governor's speeches, Acts, &c. Since the Colonial Conference of 1907 Dominion is a technical term for the self-governing Colonies. The States of Australia (New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania, in order of population) are not in the full sense self-governing Colonies, and the Provinces of Canada (Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, and Alberta, ranked in order of official precedence based on date of formation as provinces)

[1] At Commonwealth functions the precedence of state officers *inter se* is regulated by any state law (e.g. the laws of Victoria and Tasmania *re* the precedence of the judges). The State Premiers claim for themselves a higher position than ordinary Federal ministers, and for State Chief Justices a place after the Federal Chief Justice, that being the Canadian model, while the Commonwealth list places all Chief Justices after the Judges of the High Court, and Premiers after them instead of after the Federal Prime Minister.

are still less so; the Provinces of the Union which rank by the white male population are really county councils.

§ 5. Flags

The flying of flags is regulated by Nos. 148–55 of the *Colonial Regulations*. The royal standard was formerly flown at Government House on the King's birthday and on the anniversary of the King's accession and coronation: since 1911, however, the Union flag with the badge of the Colony is flown at Government House daily from sunrise to sunset. The Union flag with the approved arms or badge of the Colony, emblazoned in the centre on a white shield surrounded by a green garland, is used by an officer administering the Government, when embarked on board ship. The blue ensign with the arms or badge of the Colony emblazoned in the centre of the fly (viz. the part between the Union Jack and the end of the flag), and the pendant, are to be flown by all armed vessels in the service of a Dominion Government;[1] if not armed, the pendant, the characteristic sign of a man-of-war, is omitted, but the blue ensign is to be flown. All other vessels registered as belonging to the King's subjects in the Dominions will fly the red ensign without any badge except where specially authorized by warrant from His Majesty or from the Admiralty. Such warrants have, however, been issued in the case of Canada, the Commonwealth of Australia, and New Zealand, and since 1911 in the Union of South Africa.[2] Merchant vessels of the Dominions may carry distinguishing flags with the badge of the Colony thereon in addition to the red ensign, provided that such flags do not infringe s. 73 (2) of the *Merchant Shipping Act*, 1894.

[1] It is so flown by the Australian flotilla and the Canadian armed vessels. But the agreement of 1911 will alter this; see *Parl. Pap.*, Cd. 5746–2; below Part VIII, chap. iii. Yacht clubs which are granted the title 'Royal' by the King are allowed to fly the blue ensign defaced with the club badge on approval by the Admiralty. Naval flags are regulated by law in the *Merchant Shipping Act*, 1894.

[2] For the history of the new flag with the badge, see Ewart, *Kingdom of Canada*, pp. 65–71; 52 & 53 Vict. c. 73; Admiralty warrant for Canada, February 2, 1892.

On certain occasions if a Governor is embarked his flag may be hoisted on one of His Majesty's vessels, but this is regulated by instructions from the Admiralty.

It should be added that in the case of New Zealand a special flag is flown not merely at sea as in other Dominions, but also on land. This was provided for in a Bill of 1900, which was later, in 1901, re-enacted with modifications and is now law. The special flags of Australia and Canada are sometimes flown on land, but the use is improper, though not illegal.[1]

In the case of the Commonwealth of Australia the flag with the Commonwealth badge has been adopted for the military forces without a regulation being made under the *Defence Act* by the Governor-General in Council, but the Commonwealth flag has not been adopted for use on land, and except as specially provided by enactments having the force of law or issued in virtue of the prerogative, the only flag available for the use of British subjects throughout the world is the Union Jack, on the use of which there is no restriction.[2]

As minor points may be noted the fact that the King's permission is required for the use of the letter 'royal' by institutions of any kind, and that the use of the royal arms by tradesmen who are patronized by and receive permission from the Governor is customary in the Australian Commonwealth and New Zealand.

[1] For a discussion of the flying of foreign flags in Canada, see *House of Commons Debates*, 1910–1, pp. 4432 seq. For New Zealand see *Parl. Pap.*, 1902, A. 1, p. 9; 1903, A. 1, p. 6; A. 2, p. 10; *Canadian Annual Review*, 1910, p. 132; for the Commonwealth, *Debates*, 1908, p. 1791.

[2] Lowell, *Government of England*, i. 51, doubts this, quoting the Panama flag incident (*Times*, September 17, 1903), but see the deliberate statement made in the House of Lords on July 14, 1908, by the leader of the Government. Cf. letter from Lord Knollys, December 29, 1907, in *Canadian Annual Review*, 1908, pp. 584, 585, and ibid., 1910, pp. 261, 358.

The badge is of course determined by the Crown; see the application from the New Zealand Government in 1908 for the substitution of fern-leaves (as since Order in Council of February 28, approved by despatch of April 30, 1870, in Canada the maple-leaf) in the Governor's flag; *Parl. Pap.*, 1908, A. 1, p. 17, and for Canada, *Annual Review*, 1910, p. 261.

CHAPTER XII

IMPERIAL LEGISLATION FOR THE DOMINIONS

The Imperial Parliament has not, of course, given up its right to legislate for the whole Empire, and even its determination not to tax the Empire in North America could of course be undone by a simple taxing Act, passed in the ordinary way, which would *ipso facto* repeal that great statute of 1778, which asserts for ever the determination of the Imperial Government to abandon the principle of raising taxes save for the benefit of the Dominion concerned. The Act reserved the power to regulate trade on the understanding that the net produce of such duties as might be levied should go to the Colony. Still, for many years from that date the territorial revenues and the Crown revenues were also reserved from Colonial control, though they were regularly spent on the Colonies. But with self-government taxation and control of trade and commerce disappeared for good and have never been revived.[1]

The general rule regarding Imperial legislation is that it will not be passed save where it is necessary for the satisfactory carrying out of foreign policy and treaty obligations, or other matters of internal interest in which either uniformity or extra-territorial application is required. Thus the *Extradition Acts* of 1870 and 1873 [2] provide for the procedure to be followed in cases of extradition. The framework of a jurisdiction to be exercised in the United Kingdom and in the Colonies alike with necessary modifications is set up, and its operation may at any moment be invoked by the action

[1] The *Customs Consolidation Act*, 1876 (39 & 40 Vict. c. 36), provides a complete customs code applicable when the Colonial Legislatures have not made provision as regards customs matters, as all the Dominions have done. For the Acts as to Colonies, see Piggott, *Imperial Statutes applicable to the Colonies*; Tarring, *Law relating to the Colonies*[3].

[2] 33 & 34 Vict. c. 52, s. 17; 36 & 37 Vict. c. 60, s. 1.

of the Imperial Government in passing an Order in Council applying the rules to cases of extradition between Great Britain and any specified foreign power. The Act thus legalizes not merely the arrest in the Colony, but detention outside on the high seas, a point necessary, as the Chief Justice of the Commonwealth pointed out in *McKelvey* v. *Meagher*,[1] because of the territorial limitations of Colonial legislation. The Act also allows room for action by the local legislature ; there are two possibilities : either the local parliament may enact a complete code of extradition rules and then have that code given full effect by an Order in Council which suspends for the time being the Extradition Act in respect of that Dominion for such time only as the Act remains in force, or the Legislature may confine its activity to provisions as to what Courts are to exercise the power of committing offenders, and so on. Or the Crown may merely act upon the Imperial Act as in Newfoundland[2] and the Transvaal. The former method is that adopted by Canada. In this matter Canada has had a curious history ; the Legislature of Upper Canada in 1833 (3 Will. IV. c. 7) authorized extradition without a treaty, and in 1843, when the Act (6 & 7 Vict. c. 76) to confirm the Ashburton Treaty of 1842 was passed, it was provided that its effect could be suspended in Canada by Order in Council if a Canadian Act were passed to give suitable powers ; this was done for the Province of Canada in 1849 and in 1868 (c. 94) for the whole of Canada. When the Imperial Act of 1870 was passed there was a desire in Canada to adopt the same plan respecting all extraditions as that in force under the statutes regarding the Ashburton Treaty, but there was long delay in acceding to this request, and Acts of 1873 and 1874, which were reserved, did not come into effect. But an Act of 1877 (c. 25), as amended in 1882 (c. 20), was ordered to be taken as suspending, while it remained in operation, the action of the Imperial law, and in 1888 a similar order was issued in respect of the Act of 1886 (c. 142) consoli-

[1] (1906) 4 C. L. R. 265.

[2] *In re Israel Goldstein*, 1905 *Newfoundland Decisions*, 247 ; *Stone* v. *Rex*, [1906] T. S. 855. Cf. Piggott, *Extradition*, pp. 181 seq.

dating and amending the law, and when the *Revised Statutes* (c. 155) appeared in 1906, another Order in Council suspended the operation of the Imperial Acts. It may be added that it is not altogether easy to see what practical advantage is thus gained,[1] as the only difference resulting is that the detention in this country of a prisoner while in transit from Canada to a foreign state, or vice versa, under extradition is probably at least informal and, if he escaped re-arrest, would have to be under a new process, as against a fugitive offender at large in this country, whereas if the proceedings were taken all under the Imperial Act the warrant under which he was being conveyed from Canada would be in these circumstances adequate authority for his re-arrest.

Again, the Acts of 1869 (32 Vict. c. 10) and 1884 (47 & 48 Vict. c. 31) provide for the removal of prisoners from one Colony to another or to the United Kingdom in cases where such removal may be deemed desirable. The first Act provides for permanent arrangements between two Colonies approved by Order in Council; the second for transfers in individual cases. In all these cases the approval of the Secretary of State is needed as well as the assent of both Colonies, and the matter has sometimes attained considerable political importance, as in the case of the deportation of the chief Dinizulu from Zululand, and in the deportations from Natal after the revolt of 1906–8;[2] the prisoners were on the coming into force of union released by the order of the new Government. It would, of course, have been open to the Natal Government and Legislature to banish the men in question, but it could not by any exercise of legislative power

[1] It is true that the Governor now acts as a Colonial officer, not under an Imperial Act, but that is only a formal difference. For the history of this matter, see Canada *Sess. Pap.*, 1877, No. 13, pp. 10 seq.; *Parl. Pap.*, C. 1482, 1526, 1557, 1621, 1645, 1683. Cf. also Forsyth, *Cases and Opinions on Constitutional Law*, pp. 341–74; Clarke, *Extradition*, pp. 96 seq. Canada also has provision in its *Extradition Act* (since 1889, c. 36) for extradition without treaty, and the legality of this is seen from *Attorney-General for the Dominion of Canada* v. *Cain and Gilhula*, [1906] A. C. 542; *Robtelmes* v. *Brenan*, 4 C. L. R. 395; *Hong Kong* v. *Attorney-General*, [1910] T. S. 348.

[2] *Parl. Pap.*, Cd. 3563, pp. 8, 9

have authorized their detention elsewhere, as compared with their mere removal from the Colony, and the good offices of the Imperial Government had therefore to be invoked to legalize the transit over the seas.

The *Fugitive Offenders Act*, 1881 (44 & 45 Vict. c. 69), which re-enacts earlier provisions (6 & 7 Vict. c. 34; 41 & 42 Vict. c. 67), sets up an elaborate system under which inter-imperial extradition is provided for by a procedure in the main identical with that which has been laid down in extradition cases. The need for an Imperial Act was obvious; it seems fairly clear that without such an Act there would be no legal power of rendition of criminals as has been held by the High Court of Australia in a case which came before its notice.[1] Part ii of the Act proved a simpler procedure by the backing of warrants without the intervention of the Governor, which is required in lieu of the intervention of the Secretary of State in this country in ordinary cases of extradition. Part iii of the Act provides for the exercise of Colonial jurisdiction by either Colony where an offence is committed on the boundary of the Colony or on a journey between two Colonies, subject to the rule that no person not a British subject shall be tried for an offence not committed in a British possession. It also provides that false evidence for the purpose of the Act may be punished either in the place where it was fabricated or in the place where it was given, and it provides that offences under these sections of the Act shall be punished on the principles laid down in the *Colonial Courts Jurisdiction Act*, 1874, under which the punishment to be awarded is that most similar to the English punishment of such an offence. S. 25 of the Act legalizes the conveyance of a prisoner in a British ship from one part of a British possession to another, despite the fact that the vessel may be on the high seas during the voyage, a provision which seems to have escaped the notice of the Supreme Court

[1] *Brown* v. *Lizars*, 2 C. L. R. 837; *Hazelton* v. *Porter*, 5 C. L. R. 445. Part ii is still no doubt in force in Australia, under the Order in Council of August 23, 1883. But it is in effect rendered needless by the Commonwealth legislation under s. 51 (xxiv) of the Constitution; see Harrison Moore, *Commonwealth of Australia*,[2] pp. 481 seq. It is in force in South Africa under Orders of November 17, 1888, and December 12, 1891.

of New Zealand in the case of the *Wellington Cooks and Stewards' Union*.[1]

Again, by the *Army Act*, 1881,[2] as amended from time to time, the Imperial forces throughout the Empire are organized and controlled; there are given by the Act certain definite powers to Colonial Legislatures to alter the provisions of the Act as to fines, &c., to suit local conditions, and the Courts of the Colonies are empowered to deal with certain matters under the Act, while the Legislature may provide for dealing with these matters if necessary. These provisions are, of course, to be entirely distinguished from provisions relative to the local forces, which are governed within the Colony by reason of their own local Acts, which, however, are given validity outside the Colony by s. 177 of the *Army Act*, which expressly provides that the *Army Act* shall apply to such forces even outside the Colony only when the local Act is silent. It has now, however, been arranged that the rule is to be that local legislation provides that when the troops of a Colony are acting outside the Colony with Imperial troops the *Army Act* shall apply; but this is not extended to cover cases where the troops would be acting inside the Colony along with Imperial troops. This rule is embodied in Australian and New Zealand Defence Acts, No. 15 and 28 of 1909.[3]

In the case of the navy the *Colonial Defence Acts*, 1865 and 1909, allow the Crown to accept ships and men offered by Colonies and to use them for naval service. The Act of 1865 gives power to apply the naval regulations to men serving on these vessels when they have been accepted for service. The Act has never been much used, for the local forces of the Australian Colonies were only in part ever raised or put under its provisions, and a domestic fleet was maintained under the ordinary power of the Colonies to legislate for peace, order, and good government.[4] The Act itself disclaims any interference with the general power of the Colonies, and the Dominions have full power to legislate on defence indepen-

[1] 26 N. Z. L. R. 394.
[2] 44 & 45 Vict. c. 58.
[3] See Part V, chap. x; 9 Edw. VII. c. 3, ss. 8, 9.
[4] *Parl. Pap.*, H. L. 125, 1884–5; 9 Edw. VII. c. 19.

dently of this Act, though the limits within which such power can be exercised are not certain.

There may be mentioned as due to international considerations the *Foreign Enlistment Act*, 1870, the *Slave Trade Acts* of 1824, 1843, and 1873, the *Mail Ships Act*, 1891, the *Anglo-French Convention Act*, 1904, the *International Copyright Act*, 1886, the *Geneva Convention Act*, 1911, &c.

There are again several Acts which provide for Imperial co-operation in judicial matters. The *Bankruptcy Act* [1] requires Courts throughout the Empire to render each other assistance in bankruptcy matters; there have been a good many decisions on the Act, and it is clear that it makes a rule of law what would else be a mere rule of international comity. Again, an Act of 1859 [2] provides for the superior Courts throughout the Empire submitting cases to other superior Courts to obtain a decision as to the law prevailing in that other part of the Empire. A similar Act [3] as regards foreign countries is dependent on treaties being made, and no treaties have yet so been made. Provision also exists under an Act of 1859 [4] for the examination of witnesses and so forth by any Court in one part of the dominions of the Crown at the request of another Court, if any case is pending before that Court on which the evidence of absent witnesses is desired. Acts of 1856 [5] and 1870 [6] apply the principles of this Act to cases of civil character and of criminal character pending in foreign Courts, with an exception in cases of a political character. Powers of making rules of court in these matters are given to the Judges of the High Court in the United Kingdom, but their exercise has been waived in favour of the power of making rules already vested in Colonial Courts generally.

[1] 46 & 47 Vict. c. 52, ss. 118, 168; cf. *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos*, [1891] A. C. 460; *in re Estate Campbell*, [1905] T. S. 28; *in re insolvent Estate Skeen*, 27 N. L. R. 536, at p. 543; Clark, *Australian Constitutional Law*, pp. 298, 299; Dicey, *Conflict of Laws*,[2] pp. 330 seq.

[2] 22 & 23 Vict. c. 63; cf. *Lord* v. *Colvin*, 29 L. J. Ch. 297.

[3] 24 & 25 Vict. c. 11.

[4] 22 Vict. c. 20; 48 & 49 Vict. c. 74. The practice is regulated by local Colonial rules.

[5] 19 & 20 Vict. c. 113.

[6] 33 & 34 Vict. c. 52, s. 24.

The *Merchant Shipping Act*, 1894, confers, ratifying in this regard older Acts, full powers of legislation on Colonial Legislatures with regard to making regulations as to the examination of engineers, masters, or mates, and if the Board of Trade are satisfied with the rules thay may declare them to have the same effect in rendering certificates available as if they were the British rules; under this power (s. 102) Orders in Council have been issued for Canada, Newfoundland, and the Australian Colonies, now states, and New Zealand. It also empowers (s. 444) the Board of Trade to accept Colonial loadlines, and by Order in Council give them Imperial validity. The powers conferred in ss. 735 and 736 as to registered and coasting vessels have been dealt with above, and those as to inquiries into casualties will be mentioned later (Part VI, chap. ii).

Other Acts which rest in the main on the need for extra-territorial validity include the Act of 1865, which renders valid throughout the Empire marriages contracted in a Colony and declared valid by an Act of the Legislature, provided that the persons married were able to marry under English law at the time,[1] and the Act of 1860[2] which permits Colonial Legislatures to enact that if a person be feloniously smitten within a Colony and dies without he may be tried in the Colony where the offence was committed, though the offence did not become perfected by the death of the victim within the Colonial limits. Moreover, the Admiralty jurisdiction of Colonial Courts and the power of the Legislatures to confer such jurisdiction depends on Imperial legislation[3] to which reference will be made later.

The Imperial *Naturalization Act* of 1870 deals with the matter imperially, partly because of the question of extra-territorial effect, partly because of the need of uniformity, partly because naturalization is essentially an Imperial concern. Some of its provisions have validity throughout

[1] 28 & 29 Vict. c. 64; Blackmore, *Constitution of South Australia*, p. 68.

[2] 23 & 24 Vict. c. 122. Cf. jurisdiction given by the *Foreign Jurisdiction Act*, 1890, and *British Settlements Act*, 1887.

[3] 12 & 13 Vict. c. 96; cf. 46 Geo. III. c. 54, and 53 & 54 Vict. c. 27.

the Empire ; thus the nationality of a wife is declared to be that of her husband, and provision is made of universal validity as to the status of children who live with a person who has become naturalized during childhood. There is, however, a great difference between the case of naturalization in the United Kingdom and naturalization in a Colony. In the first case, the naturalization is valid throughout the Empire, in the latter case only in the Colony itself. There are such laws in all the Dominions, Canada, Newfoundland, Australia, New Zealand, and the Union of South Africa, naturalization in the federations being federal now.

The position is anomalous and rather absurd. Thus a man who is naturalized in a British Colony may be a minister of the Crown there, but becomes when he goes outside the territory a foreigner. There are several consequences which would flow from this position ; in the first place, it is held that he does not fall under the *Foreign Jurisdiction Act*, so that a British naturalized subject in China, formerly in Korea, or Siam, or Turkey, or Morocco, would not be subject to consular jurisdiction. It would then seem to follow that he was subject to the local jurisdiction, but that in turn would be intolerable, for clearly he would expect and every one would expect that he should receive full protection from his adopted country. Yet if the country's consular Courts exercised jurisdiction, he might in England bring an action against the consular judge, when next he visited this country, and obtain damages for false arrest and so forth. Moreover, it is not satisfactory from any point of view to maintain this curious localization of British nationality. The objection that the declaring of all persons colonially naturalized to be full British subjects would open naturalization to many unworthy persons is of no weight when it is remembered that every native of Papua is a natural-born British subject, and an average naturalized person is not at all on a level with a native of Papua. Further, the grant of British nationality need not carry with it for a moment full civil rights as if he were a natural-born British subject ; such rights are often not accorded in the Colonies to naturalized persons without

a special term of residence, especially in regard to the franchise [1] and old-age pensions, and the declaration that every person naturalized in a Colony was a British subject all the world over would have nothing but an excellent effect.[2]

Local legislation as to naturalization differs substantially from British merely in the length of time required ere naturalization takes effect; thus in Canada a period of three years is required, while in New Zealand the time is left to the discretion of the authorities; in the Cape it used to vary from time to time, but was very short. In addition in Australia there was a colour bar against naturalization, which of course is not English, and with federation each state has a separate system, just as in Canada until 1867. By Act No. 4 of 1910 the legislation of the Union of South Africa is made uniform, but natives are not usually naturalized, the matter being one of discretion.

There has been desultory discussion of the possibility of establishing a naturalization which would have Imperial validity on condition of complying with Imperial conditions; such naturalization would be in addition to the still limited local naturalization, and would be a special advantage; but though the scheme is not unpromising, it may be noted that it would cause trouble to a man who had already naturalized himself to get a second certificate, and that a further complication of a tiresome and obscure question is to be deprecated. It may be added that the Governors of British Colonies are allowed by the Act of 1870 to grant certificates of re-admission to British nationality in the cases contemplated in the Act; such re-admission has Imperial validity.

There are all sorts of Acts applying to the Colonies which are not exercises of legislative authority with regard to the Colonies at all, but are legislation with regard to things in the United Kingdom, provided things in the Dominions are

[1] See Part III, chap. v; *Parl. Pap.*, Cd. 5273, pp. 155, 156.

[2] The question was considered at the Imperial Conference of 1911. See *Parl. Pap.*, Cd. 3524, pp. 52–159, for the draft Bill to consolidate and amend the Imperial Act. This contemplated a grant of Imperial naturalization in a Colony if substantially similar conditions to those enforced in England were fulfilled; *Journ. Soc. Comp. Leg.*, xvii. 135–41.

done in a certain manner. Thus there is no longer maintained the Imperial legislation of 1868, which gave each British doctor a right to be registered in the Dominions in virtue of his registration in this country ;[1] on the contrary, the Act of 1886, amended in 1905 to apply to Canadian provinces also, allows the recognition of registration here of Colonial doctors on condition of reciprocity and on satisfactory evidence being forthcoming that the Colonial course is approximately equal to the British. Another case of such legislation is the rule with regard to Colonial probates, under which the Court in the United Kingdom will seal the probate of a Colonial Court if the Colony has made adequate provision for reciprocal recognition of Imperial probates.[2] Formerly, a person with probate of a will of a person who had died domiciled in a Colony, could obtain a grant of administration with the will annexed, but now he could automatically seal the probate in the English Court. Similarly, under s. 20 of the *Finance Act*, 1894, where a Colony either levies no duty on death in respect of English estates or allows reciprocity, a sum equal to the duty levied in the Colony will be allowed in respect of property in a Colony of persons dying domiciled in England.[3] Another important series of Acts deal with Colonial stocks.[4]

One very important function of the Imperial Parliament is the validating of laws invalidly passed by the Colonial Legislatures. Thus in the case of South Australia the *Constitution Act*, No. 2 of 1855–6, was apparently valid in itself, but the *Electoral Act*, No. 10 of 1856, under which the first two Houses were elected, was invalid, for it was not reserved as required by the Constitution. Therefore all the legislation passed was

[1] See *Reg.* v. *The College of Physicians and Surgeons of Ontario*, 44 U. C. Q. B. 564 ; 1 Cart. 761 ; 21 & 22 Vict. c. 90 ; 49 & 50 Vict. c. 48 ; 5 Edw. VII. c. 14.

[2] 55 Vict. c. 6.

[3] See above, Part III, chap. ii. Cf. also 63 & 64 Vict. c. 14 (admission of Colonial solicitors) ; 41 & 42 Vict. c. 33 ; 49 & 50 Vict. c. 48, ss. 23, 26 (dentists), &c. There are also certain reciprocal provisions regarding patents ; see 46 & 47 Vict. c. 57, ss. 103, 104 ; 48 & 49 Vict. c. 63 ; 5 Edw. VII. c. 15, s. 65.

[4] 40 & 41 Vict. c. 59 ; 55 & 56 Vict. c. 35 ; 63 & 64 Vict. c. 62.

invalid, and so it was confirmed by no less than three Acts, one in 1862, another in 1863, and another in 1865.[1] In 1901[2] it was found necessary to validate a series of New South Wales, Queensland, and Western Australia Acts, and in 1907[3] a final *ex post facto* validation was given to every Act passed by a Colonial or State Parliament if assented to by the Governor and not disallowed, or reserved and assented to by the Crown, whether or not the proper forms had in each case been adopted. In the case of Canada, an Act of 1871 removed doubts as to the validity of the Canadian Acts of 1869 and 1870 respecting the administration of the North-Western Territories and Manitoba, an Act of 1875 validated the *Oaths Act* of 1868 and extended the power of the Dominion Parliament to define the privileges of the Houses, and an Act of 1886 defined the powers of the Dominion Parliament as to the representation in the Parliament of the territories not yet provinces. A later Act of 1907 altered the amounts of the provincial subsidies, and an Act of 1895 enabled the appointment of a Deputy-Speaker in the House of Commons.[4]

In the case of the Commonwealth, British North America, and the Union of South Africa, Imperial legislation was essential to provide for a federation or union; otherwise all the power of the legislatures would have been unavailing to create a federation or union. The Imperial legislation which established the Constitutions of the Australian Colonies was due to the desire to establish governments with limited powers to begin with, in place of the representative governments which alone the Crown could erect, and once legislation was started it was impossible to get rid of it except by other legislation. In Newfoundland a clear sweep was made before the letters patent of 1832 were issued under the prerogative, but an Act of 1847 defined certain principles which regulate the government still. In New Zealand the establishment of

[1] See Blackmore, *Constitution of South Australia*, pp. 64–8.
[2] 1 Edw. VII. c. 29. Cf. also 56 & 57 Vict. c. 72.
[3] 7 Edw. VII. c. 7.
[4] See *Provincial Legislation*, 1867–95, pp. 13 seq.

a representative legislature under an Imperial statute was inevitable in view of earlier legislation in 1840 and 1846, and other Acts were needed in 1857, 1862, and 1868 to make the path of the Parliament clear by removing obsolete fetters on its action.[1]

The boundaries of a Colony are not open to a Colony to regulate; this follows from the fact that the territory for which it legislates is clearly what it has not, but what it wants to get. It was long thought that a mere exercise of the prerogative in every case was sufficient to transfer territory to a Colony, but at last doubts on this head became very strong; in some cases the boundaries had received incorporation in an Act of Parliament, and it was asked whether they could be changed thereafter. Finally, the whole matter was determined by the *Colonial Boundaries Act*, 1895, which ratifies all such alterations *ex post facto* and for the future, subject to the reserve that the consent of the self-governing Colonies enumerated was necessary. This Act was made by the Commonwealth Constitution Act, 1900, to apply to the Commonwealth as a whole, and not to the individual states. In the case of the Union of South Africa it applies to the Union. It may be noted that from their establishment to their extinction the Transvaal and the Orange River Colony never fell under the protection of the Act, which could have been used to alter very considerably their boundaries despite any adverse views which they might have had. The Act was availed of to transfer territory from the Transvaal to Natal after the Boer war, but not to add Papua to the Commonwealth. That possession is merely under the authority of the Commonwealth under s. 122 of the Constitution.

Other Imperial Acts owe their character to the subject-matter. Thus the Act of 1901 regarding the demise of the Crown is general in terms and applied to Australia, as was seen on the occasion of the death of the late King in 1910, when the question was discussed,[2] and so is the Act to add

[1] See these Acts in *Constitution and Government of New Zealand*, pp. 12–17.

[2] The Queensland Act of 1910, which re-enacts the provisions of the Act

new titles to the Crown. Again, the *Regency Act* of 1910 is a case of Imperial legislation which could not be varied for the Dominions; the *Civil List Act* and the Act to alter the declaration at accession were instances of similar legislation; the latter evoked an ardent address from the Lower House of the Commonwealth in favour of the change.[1]

In conclusion, the *Colonial Laws Validity Act*, 1865, the *Interpretation Act*, 1889, and the *Parliament Act*, 1911, are necessarily a piece of Imperial legislation.[2]

of 1901, is rendered more than a mere nullity by the addition of a clause relieving officers of taking the oath over again, as to which there was doubt. The Privy Council in 1910 decided on a reference that oaths need not again be taken by judicial officers, &c., in England, and South Australia has accepted the view and so also apparently Victoria.

[1] See 1 Edw. VII. cc. 4, 5, 15; 10 Edw. VII & 1 Geo. V. cc. 26, 28, 29; 39 Vict. c. 10.

[2] The *Official Secrets Acts*, 1889 and 1911, are noteworthy in applying to the Empire, but with a proviso for their suspension in cases where local legislation is passed. No Orders have been issued, though such legislation exists in Canada (*Rev. Stat.*, 1906, c. 146, ss. 73, 85, 86), Australia (*Defence Act*, 1903-9, ss. 73, 82), and New Zealand (Act No. 28 of 1909, s. 61). See also the *Explosives Act*, 1883, s. 3; 24 & 25 Vict. c. 100, ss. 9, 57; 16 & 17 Vict. c. 48 (Colonial coinage offences); 39 & 40 Vict. c. 36, ss. 151, 161 (customs); 22 Geo. III. c. 75; 54 Geo. III. c. 61; 57 & 58 Vict. c. 17 (leave of absence); 11 & 12 Will. III. c. 12; 42 Geo. III. c. 85 (punishment of Governors); 5 & 6 Vict. c. 45; 10 & 11 Vict. c. 95 (copyright); 25 & 26 Vict. c. 20 (prohibition of issue of *habeas corpus* into Colony with a Court able to issue the writ *ex parte Anderson*, 30 L. J. Q. B. 129; *R.* v. *Crewe, ex parte Sekgone*, [1910] 2 K. B. 576). It is instructive to compare the terms of e.g. 17 & 18 Vict. c. 80, s. 58, which make certain certificates of birth, &c., available in all the Dominions, with e.g. 7 Edw. VII. c. 16 as to the proof of Colonial laws in England, or the objection to legislation regarding marriage in *Parl. Pap.*, Cd. 5273, pp. 200, 210, 211. The *Pacific Cable Board Acts* (1 Edw. VII. c. 31; 2 Edw. VII. c. 26) represent the carrying out of a joint business.

PART VI. THE JUDICIARY

CHAPTER I

THE TENURE OF JUDICIAL OFFICES

At the time of the grant of responsible government, the judicial officers generally in the Colonies enjoyed a secure tenure; it was possible under Burke's Act[1] for the Governor in Council of a Colony to amove the judge for such reasons as the Governor in Council might think fit; but such amoval was subject to an appeal to the Privy Council in the ordinary course, and therefore it was secured that the judge should not lose office without the approval of the Privy Council. Moreover, the practice had grown up of removing judges on petition from the Houses of the Legislature.[2] This removal, however, which was based on the analogy of the English practice, was not considered a matter of course. A Colonial legislature might petition for the removal of a judge, but the judge would be removed only if after full consideration it was considered suitable by the Imperial Government.

When responsible government was adopted in Canada, the only other precaution which was considered necessary for the purpose of securing the position of the judges was the provision of their salaries in the Civil List. Thus the Union Act of 1840 for Canada contains a full provision for the judges of Upper and Lower Canada, placing their salaries in Schedule A. It was left open for the Provinces of Canada

[1] 22 Geo. III. c. 75.

[2] *Representatives of the Island of Grenada* v. *Sanderson*, 6 Moo. P. C. 38. Such petitions were referred to the Privy Council under 3 & 4 Will. IV. c. 41, s. 4.

by Act of the Legislature to alter salaries of the Governor and of the judges.[1] The tenure was fixed in 1843 and 1849.

Provision for the judges' salaries was also included in the Civil Lists set up in the Provinces of Nova Scotia, New Brunswick, and Prince Edward Islands, on condition of and in anticipation of receiving the benefit of responsible government, and Nova Scotia regulated the tenure of office.

A formal change, however, in practice took place when the Australian Colonies came into existence. It was then considered desirable specially to make provision for the security of the judges' tenure of office, and so it is provided under the Constitution Act of New South Wales[2] as follows :—

XXXVIII. The Commissions of the present Judges of the Supreme Court of the said Colony, and of all future Judges thereof, shall be, continue and remain in full force during their good behaviour, notwithstanding the Demise of Her Majesty (whom may God long preserve) or of Her Heirs and Successors, any Law, Usage, or Practice to the contrary thereof in anywise notwithstanding.

XXXIX. It shall be lawful, nevertheless, for Her Majesty, Her Heirs or Successors, to remove any such Judge or Judges upon the Address of both Houses of the Legislature of this Colony.

XL. Such salaries as are settled upon the Judges for the time being by Act of Parliament or otherwise, and also such salaries as shall or may be in future granted by Her Majesty, Her Heirs and Successors, or otherwise, to any future Judge of Judges of the said Supreme Court, shall in all time coming be paid and payable to every such Judge and Judges for the time being so long as the Patents or Commissions of them or any of them respectively shall continue and remain in force.

Similar provisions were adopted in the case of Queensland in 1859 by letters patent of June 6, 1859, which were issued under the authority of one Imperial Act and confirmed by another, and re-enacted by the Queensland Parliament in

[1] The Legislature in 1847 fixed by local Act (c. 114) the Civil List. There is no Civil List in the *British North America Act*, but the salaries were at once fixed by law ; see *Revised Statutes*, 1906, c. 138.

[2] 18 & 19 Vict. c. 54, sched. ; Act No. 35 of 1900, ss. 10, 11.

1867,[1] by South Australia under ss. 30 and 31 of the local Act, No. 2 of 1855–6,[2] and in 1890 under the Constitution Act of Western Australia,[3] which was scheduled to an Imperial Act. In the case of Victoria the same provisions were inserted as in the case of New South Wales, but the power was given not as in that case to Her Majesty, but to the Governor, a difference of some substance.[4] The result of these powers would seem to differ in part according to the authority by which the clauses were inserted. In the case of New South Wales, Queensland, and Western Australia, in which the power is given by an Imperial Act to Her Majesty, it would seem that it might fairly be argued that a power of amotion which is given by Burke's Act must be considered as no longer being applicable. It is true that a power of amotion given to a Governor in Executive Council is not the same as a power of removal on representations from the two Houses of the Legislature. But it may fairly be held that in granting a Constitution with the intention of its being exercised under responsible government, a provision for removal in a certain manner, being that provided in the Constitution of the United Kingdom, is intended to be the sole provision for such removal. It may therefore be held that Burke's Act has been repealed so far as these Colonies, now states, are concerned. On the other hand, it is clear that the local Act of South Australia cannot possibly invalidate the legislation of the Imperial Parliament and that the power to amove still exists in South Australia.

In the case of Victoria again the matter is complicated by the fact that the power of removal is granted to the Governor and not to the Crown. It may therefore be argued with

[1] See clauses ii, xv, xvi, xxii of letters patent; 31 Vict. No. 38, ss. 4, 16, 17. A tax on an income is not an interference with the salary under this provision; see *Cooper* v. *Commissioners of Income Tax for Queensland*, 4 C. L. R. 1304; 5 Edw. VII. No. 34. A federal tax on a judge is therefore constitutional; contrast Quick and Garran, op. cit., p. 734.

[2] Also as to salaries by s. 18 of 13 & 14 Vict. c. 59.

[3] 53 & 54 Vict. c. 26, sched. ss. 54–6.

[4] 18 & 19 Vict. c. 55, sched. ss. 38, 39. The provisions do not appear in the *Supreme Court Act*, 1890, which (s. 13) allows the Governor in Council to suspend.

even more strength than in the case of New South Wales, Queensland, and Western Australia, that it is intended that the power given by Burke's Act should not be exercised, and that it is in effect repealed, but, as will be seen below, this view has been questioned by the Law Officers of the Crown.

In the case of Tasmania no provision is made by the Constitution Act, 18 Vict. No. 17, but it is provided by the Act 20 Vict. No. 7, that

whereas the independence of judges is essential to the impartial administration of justice and is one of the best securities of the rights and liberties of Her Majesty's subjects; and it would conduce to the better security of such independence if the power of suspension or amotion by the local Government were further limited, be it therefore enacted by His Excellency the Governor of Tasmania by and with the advice and consent of the Legislative Council and House of Assembly in Parliament assembled, that it shall not be lawful for the Governor either with or without the advice of the Executive Council to suspend, or for the Governor in Council to amove, any Judge of the Supreme Court unless upon the Address of both Houses of the Parliament of Tasmania.

It is clear, however, that this Act cannot possibly override Burke's Act which therefore, although the local Act purports to amend it, remains in force. On the other hand, the Act is no doubt effectual to dispose of what otherwise was possible, that is to say, the suspension by the Governor, with the advice of his Executive Council, of a judge, with a view to his removal by the approval of the Secretary of State. As that right rested solely upon the royal instructions to the Governor, it could be taken away by legislation when it was thought fit so to legislate, but the legislation could not derogate from the provisions of an Imperial Act.

On the other hand, this legislation was presumably effective to alter the provisions of the Imperial Act, 9 Geo. IV. c. 83, which provided for the appointment of judges by the King and for their removal by the King from time to time as occasion might require. The *Colonial Laws Validity Act*, 1865, s. 5, gave power to regulate the constitution of Courts of Justice, and it was therefore within the power of the Parliament to

legislate as it did by Act 50 Vict. No. 36, s. 5, which provides that after the commencement of that Act the nomination and appointment from time to time of the Judges of the Supreme Court by virtue of any power in that behalf enabling shall be by the Governor in Council by letters patent under the Public Seal of the Colony, any law, statute, charter, or usage to the contrary notwithstanding.[1]

In the case of New Zealand, the legislation with regard to judges is set out in the judgement of the Privy Council in the case of *Buckley* v. *Edwards*,[2] which established on a secure basis the independence of the judiciary. This case was decided by the Privy Council in 1892 on appeal from the Court of Appeal of New Zealand. The question which arose there was whether the respondent had been authoritatively appointed a Puisne Judge of the Supreme Court by virtue of a Commission dated March 2, 1890. It was held in the Court of New Zealand by a majority that the appointment was valid, while the minority held that as there was no vacancy on March 2, 1890, by death, removal, or resignation of any of the four judges who made up the Court, and as the General Assembly had not appointed out of revenue a salary for a fifth judge, there was no power on the part of the Crown to appoint the respondent. As a matter of fact, the House of Representatives had refused to vote a salary for the judge, and had refused leave to bring in a Bill to validate his appointment. It was contended for the respondent that the Governor had power to appoint him, having regard to the prerogative and under the legislation of New Zealand.

The judgement of the Court was against the respondent. The respondent was appointed to be a Commissioner under the *Native Land Courts Acts Amendment Act*, 1889, and partly in view of the importance of the post, and partly because of the delay in the ordinary work of the Courts, the Government

[1] In the case of the other Colonies the old charters were altered by the Constitution Acts. For the causes of the passing of the Act of 1865, see Blackmore, *Constitution of South Australia*, pp. 64 seq.

[2] [1892] A. C. 387. Provision has been made in 1910 by law (No. 68) for the addition of a new judge. Cf. Quick and Garran, *Constitution of Commonwealth*, pp. 727 seq. See *Const. Stat.*, 1908, No. 89, ss. 4-15; No. 22, Sched. 2.

thought it right to appoint him by Commission a Judge of the Supreme Court. But there was no special parliamentary sanction, nor was any salary granted, and owing to a change of Ministry the salary was refused and a Bill to add a judge to the Supreme Court was refused leave for introduction. The Judicial Committee, adverting to the arguments which had been used before as to the power of appointing judges in England, pointed out that with two possible exceptions, the latest of which was 1714, since the reign of James I no additions had been made without express parliamentary sanction. But at any rate, after the Act 1 Geo. III. c. 23 it would be difficult to contend in the United Kingdom that the Crown could appoint additional judges for the payment of salary to whom Parliament had given no sanction. For the purpose of the independence of the judges, judges must be presumed to be intended to receive salaries. It was clear that the Constitution Act of 1852 (s. 65), which appointed salaries for a Chief Justice and a Puisne Judge, forbade the salary of any judge to be diminished during his term of office. This provision would be rendered practically ineffectual if the Executive could appoint a judge without salary, who would have to come to Parliament each year for remuneration for his services. It might well be that the provision impliedly declared that every judge thereafter appointed should have a salary provided by law to which he would be entitled during his continuance of office. In 1857 a temporary appointment of a Puisne Judge was made, though there was no vacancy; as a result two Acts were passed in 1858, one to regulate the appointment and tenure of offices of judges, and the other to alter sums granted to the Crown by the Constitution Act for civil and judicial services. The second section of the first Act provided that the Supreme Court of New Zealand should consist of a Chief Justice and 'of such other judges as His Excellency, in the name and on behalf of Her Majesty, shall from time to time appoint'. It was also provided that the commissions of judges 'shall be and continue in force during their good behaviour notwithstanding the Demise of Her Majesty, any

Law, Usage, or Practice, to the contrary notwithstanding'.[1] But the fourth clause of the Act empowered the Governor at his discretion, in the name and on behalf of Her Majesty, upon the address of both Houses of the General Assembly, to remove any judge from his office. It was contended that the second clause enabled the Governor to appoint as many judges as he pleased, although salaries had not been provided or had been provided for other services, as in this case. It was improbable that this was the correct interpretation. It was most important to maintain the independence of the judges. They said, 'it cannot be doubted that, whatever disadvantages may attach to such a system, the public gain is, on the whole, great. It tends to secure an impartial and fearless administration of justice, and acts as a salutary safeguard against any arbitrary action of the executive. The mischief likely to result if the construction contended for by the respondent be adopted is forcibly pointed out by one of the learned judges, who held the appointment now in question to be valid. He said :—

In the present case, until such time as the matter may be finally dealt with by Parliament, the position will undoubtedly remain most unsatisfactory. The judge is absolutely dependent upon the Ministry of the day for the payment of any salary, and has to come before Parliament as a suppliant to ask that a salary be given him. It is difficult to conceive a position of greater dependence. No judge so placed could indeed properly exercise the duties of his office. One of these duties, for instance, is the trial of petitions against the return of members to Parliament. How could a judge in this position be asked to take part in such a trial ? Against the occurrence of such a state of things obviously neither the power of the purse which Parliament has, nor the power of removal by address, can be a sufficient protection.'

Of course if it were clearly the intention of the legislature effect must be given to it, but it was legitimate to construe the Act as a whole to see what construction ought to be put upon any particular provision. Now s. 6 of the Act provided

[1] Copied from the Imperial Act, 1 Geo. III. c. 23. The general rule of the need of new commissions on the demise of the Crown was abrogated by the Imperial Act 1 Edw. VII. c. 5, which is valid over all the Empire.

that a salary equal at least in amount to that which at the time of the appointment of any judge shall be then payable by law shall be paid to such judge so long as his patent or commission shall continue and remain in force. This was a clear intimation of the intention of the legislature that no judge should be appointed unless there was a fixed salary payable to him by law as a judge. Besides, s. 7 authorized the Governor in Council, during the illness or absence of any judge or for other temporary purposes, to appoint a judge to hold office during pleasure, and such judge shall be paid such salary not exceeding the amount payable by law to a Puisne Judge of the said Court. This clearly implied that a Puisne Judge shall have a definite salary. Moreover, the Superannuation Acts implied that every Judge of the Supreme Court shall be entitled to an annual salary at the time of his resignation.

Though the Act of 1858 had been superseded by the Act No. 29 of 1882, the terms of the former Act were relevant as showing the sense of the terms of the later Act. In place of s. 6 of the earlier Act, s. 11 of the later Act provided that the salary of a judge shall not be diminished during the continuance of his commission. The reason for the change of language was not clear, but it did not appear to be intended to effect the limitation of the power of judges. There were no exceptions in practice since 1858, though there might have been some slight irregularity with regard to certain appointments. They therefore gave judgement against the respondent, but did not require him to pay the costs in either Court.[1]

[1] Presumably the same reasoning would be applied in any similar case, but the commissions and now the letters patent constituting the office of Governors empower the Governor to appoint judges *eo nomine*. So it has been held (see Munro, *Constitution of Canada*, p. 243) that the Governor-General of Canada alone (as opposed to the Lieutenant-Governors) could appoint judges by virtue of the prerogative, probably a sound view; contrast Wilson J. in *Reg.* v. *Amer*, 42 U. C. Q. B. 391; 1 Cart. 722, who held that a Lieutenant-Governor of Ontario could issue a commission to hold a Court of Assize; but this power seems possibly a provincial prerogative, as the constitution of Courts of Justice is a provincial matter under the *British North America Act*, while the appointment of Judges of the Superior Courts is assigned expressly to the Governor-General by the Act.

There is nothing in the *British North America Act* which relates to the tenure of the Supreme Court Judges, and their tenure therefore depends upon the Canadian Act, which established the Supreme Court of Canada.[1] That Court as now constituted under the *Supreme Court Act*, c. 139 of the *Revised Statutes* of 1906, consists of a Chief Justice and five Puisne Judges appointed by the Governor in Council by letters patent under the Great Seal. It is provided by s. 9 that the judges shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons.

In the case of Judges of County Courts it is provided by s. 28 of the *Revised Statutes*, c. 138, that every Judge shall, subject to the provisions of the Act, hold office during good behaviour and residence in the county or counties over which his Court is established. But he may be removed from office by the Governor in Council for misbehaviour or for incapacity or inability to perform his duties properly on account of old age, ill health, or any other cause, if the circumstances respecting the misbehaviour, incapacity, or inability are first inquired into, and if the judge is given reasonable notice of the time and place appointed for the inquiry, and is afforded an opportunity by himself or his counsel of being heard thereat, and of cross-examining the witnesses and adducing evidence on his own behalf. If he is removed from office for any such reason, the Order in Council providing for his removal, and all reports, evidence, and correspondence relating thereto, shall be laid before Parliament within the first fifteen days of the next session. The Governor-General in Council may for the purpose of inquiring into the circumstances respecting the misbehaviour, inability, or incapacity of a Judge, issue a commission to one

[1] 30 Vict. c. 3, s. 99, makes the Judges of the Superior Courts in the provinces hold during good behaviour, and provides that they shall only be removable by the Governor-General on address of the Senate and House of Commons. The salaries of judges are not voted annually, but put on the Civil List; Bourinot, *Constitutional History of Canada*, p. 151; *Revised Statutes*, 1906, c. 138.

or more Judges of the Supreme Court of Canada, or to one or more Judges of any superior Court in any province of Canada, and the commissioners have full powers to make the inquiries directed by the Governor-General.

In the case of provincial Judges of Superior Courts of the Dominion it seems clear that the power of removal given in this case by the Imperial Act to the Governor-General on address from the two Houses[1] is intended to be exclusive, and that Burke's Act has no application.

In the case of Newfoundland the position of the Judges used to rest upon the Charter of Justice given by George IV in 1825. The Charter of Justice provided for the appointment of judges by the Crown, and for the removal by the same authority. It would seem that there is nothing in this to prevent the operation of Burke's Act in this case, nor would there have been anything to prevent the Crown removing a judge on addresses from the two Houses of the Legislature.[2] This mode of procedure is now laid down in Act No. 3 of 1904, but it cannot exclude the operation of Burke's Act.

In the case of the Cape of Good Hope no provision was made for the security of the judges on the grant of responsible government. The power of removal of the judges was vested in the Crown by the Charter of Justice, and the Governor had power to suspend judges, and it was evidently not considered essential to make formal provision to supersede the procedure there indicated.[3] Amoval by the Governor would have been possible under Burke's Act.

[1] In the case of the Supreme Court, theoretically Burke's Act may be held to apply. In the case of District Courts the Act may also apply, as there is no other method specified, and so as regards County Courts, but there is also special provision for their case by a Canadian Act; see *in re Squier*, 44 U. C. Q. B. 474. There are standing disputes between Dominion and Provinces with regard to Provincial Legislatures trying to regulate the appointment of judges, &c.; e.g. *Provincial Legislation*, 1867–95, pp. 83 seq., 345 seq., 1048 seq., 1080; 1896–8, p. 12; 1904–6, p. 155.

[2] Judge Boulton was removed under representative government at the instance of the Assembly. He was a member of the Council.

[3] See *Consolidated Statutes*, 1652–1895, i. 95; Act No. 35 of 1896.

In the case of Natal, however, special provision was made by the local Act [1] that it would be lawful for the Crown on the address from both Houses of Parliament to remove the judges, and it is clear that the power of amotion which was granted by Burke's Act remained unaffected. In all these cases the right of the Crown to dismiss for misbehaviour by a *scire facias* or a criminal information at the suit of the Attorney-General presumably remained unaffected, though the power is of no real moment.

A new departure to some extent was made by the *Commonwealth of Australia Constitution Act*, 1900. It was there laid down with regard to the judges as follows :—

S. 72.[2] The Judges of the High Court and of the other Courts created by the Parliament—

1. Shall be appointed by the Governor-General in Council ;
2. Shall not be removed except by the Governor-General in Council on an Address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.
3. Shall receive such remuneration as Parliament may fix, but the remuneration shall not be diminished during their continuance in office.

Under the *Judiciary Act* of 1903 there were three judges, to whom two were added by Act No. 5 of 1906. The salaries are £3,000 a year, and £3,500 for the Chief Justice.

It will be noted that proved misbehaviour or incapacity is laid down as the ground of removal,[3] but it is clear that it would still have rested on the Parliament to decide what proof it would ask of such incapacity or misbehaviour.

[1] No. 14 of 1893, ss. 43–5 (the usual provision against alteration of salaries is made in s. 45).

[2] 63 & 64 Vict. c. 12, Const.

[3] Therefore no other mode of removal (as by *scire facias*, &c.) would be available ; see Quick and Garran, op. cit., p. 730. The British practice (Todd, *Parliamentary Government in England*, ii. 857 seq.) allows removal (1) for misbehaviour, (2) on address of Parliament, which may be based on less than misbehaviour. In Australia and the Union there must be misbehaviour, and an address is the mode of procedure indicated to show that misbehaviour has occurred. See also Harrison Moore, *Commonwealth of Australia*,[2] pp. 200–5.

Accordingly the direction amounted to no more than that the Parliament should satisfy itself before passing addresses that the incapacity or misbehaviour clearly existed.

This model was followed in the framing of the Constitution of the Transvaal and the Orange River Colony. It is provided in Clause xlviii of the letters patent, December 6, 1906, issued in respect of the Transvaal, and Clause l in the letters patent of June 5, 1907, in respect of the Orange River Colony, that Judges of the Supreme Court (1) shall be appointed by the Governor in Council; (2) shall not be removed except by the Governor in Council on an address from the Legislative Council and Legislative Assembly praying for such removal on the ground of proved misbehaviour or incapacity; (3) shall receive such remuneration as shall from time to time be prescribed by law, but the remuneration of a judge shall not be diminished during his term of office. The remuneration of the present judges shall not be diminished, and their commissions shall continue as heretofore.

In the case of the Commonwealth, however, as the statute laying down the new power was an Imperial one, it would have had effect to override the provisions of Burke's Act, while its provisions would have still applied to the case of the judges of the two South African Colonies.

In the case of the Union of South Africa it is provided by s. 101 of the Constitution Act that the Chief Justice of South Africa and other Judges of the Supreme Court of South Africa shall not be removed from office except by the Governor-General in Council on an address from both Houses of Parliament in the same session, praying for such removal on the ground of misbehaviour or incapacity. S. 100 provides that the Chief Justice of South Africa, the ordinary Judges of Appeal, and all other Judges of the Supreme Court of South Africa to be appointed under the establishment of the Union, shall be appointed by the Governor-General in Council, and shall receive such remuneration as Parliament shall prescribe, and their remuneration shall not be diminished during their continuance in office. The terms of this Act clearly exclude the operation of Burke's Act.

As the provisions of Burke's Act are not yet entirely obsolete, in theory at least, it may be well to state briefly what their effect is. The Act was passed, as appears clearly from the preamble and the circumstances in which it was enacted, to put an end to the practice of officers who had received appointments by patent in the Colonies performing their duties by deputy and staying in England. It was intended that they should act in their offices unless granted leave by the Governor in Council. But their offices were to remain like other patent offices, quasi-freehold, from which they could not be removed except on the ground of misconduct, and power of amotion with a right of appeal to the Privy Council was given by that Act to the Governors in Council.

It is not certain whether the intention of the Act was to apply only to offices granted by patents issued under the Great Seal of the United Kingdom, or whether it was intended to apply also to officers appointed under the Great Seal of the several Colonies.[1] The Act was not limited in its operation to judicial officers, and as a matter of fact, both modes of appointment were known at the time when it was passed, and it may be that it was within the intention, or if not within the intention within the wording, of the Act as passed to include all offices held by patent, whether that patent might be one passed under the Great Seal in this country or passed under the Great Seal of the Colony. It has, however, been held by the Judicial Committee of the Privy Council, in a case which was actually before them for decision, that the power of the Governor in Council to amove an officer was not affected by right to appeal under Burke's Act if the officer held at pleasure,[2] and it would appear clearly

[1] The point is not taken in any case, and is not noticed by the Privy Council in their minutes on Sir F. Rogers's memorandum of 1870; see *Parl. Pap.*, C. 139; 6 Moo. P. C. (N. S.), App. IX. In *Montagu* v. *Lieutenant-Governor of Van Diemen's Land*, 6 Moo. P. C. 489, the patent of Montagu was an English one. But see also *Willis* v. *Sir George Gipps*, 5 Moo. P. C. 379, and Boothby's patent was a South Australian one.

[2] *Ex parte Robertson*, 11 Moo. P. C. 288. Mr. Robertson was only a Commissioner of Crown Lands, not a judge.

to follow from that decision that the right of amotion is absolute in the case of all officers, whether holding by patent or not, unless they hold during good behaviour. On that assumption the only officers to which the Act still applies are such officers as hold during good behaviour, and are appointed by patent ; that is, in the self-governing Colonies practically only the judges and a few other officers.[1] But it may safely be assumed that an amotion will not be resorted to again in a self-governing Colony. The constitutional mode of procedure is clearly that laid down in so many Constitutional Acts, an address either separately or jointly from the Houses of the Colonial Legislature on the model of the procedure in the United Kingdom itself.

There is, however, a distinction between those cases in which the power to remove is vested in the Governor and those in which it is vested in the Crown. It has definitely been decided by the Law Officers[2] that if the power is vested in the Crown, the Crown will not exercise that power without inquiry ; it will use its power to refer the case to the Privy Council under the Act 3 & 4 Will. IV. c. 41, s. 4, and the Privy Council will consider whether a case has been made out on which the Secretary of State should be advised to act. There is no legal necessity to refer to the Privy Council, but naturally the Secretary of State in considering so grave a matter would prefer to refer to a body skilled in Colonial law, and by their weight and knowledge possessing an authority which cannot be possessed by any Secretary of State.

On the other hand, though there has been no case of recent years, and it may be expected that cases are not very likely to arise, it would obviously be a strong matter to refuse to accept the petition from two Houses of a Dominion Legisla-

[1] Such as railway commissioners, auditors, civil service commissioners, and members of the Native Board contemplated in the schedule to the *South Africa Act*, 1909, and members of the Inter-state Commission contemplated in the Commonwealth Constitution ; also members of certain Commissions, e.g. the Land Tax Commission (Act No. 21 of 1910).

[2] See *Parl. Pap.*, August 1862 (Boothby's case), pp. 68, 69.

ture for the removal of a judge, and therefore as the matter is ultimately of local importance, it seems better that in this case the Constitutions should provide, as in some cases they do, that the power of removal is vested in the Governor-General or Governor on address from the Houses of the Legislature. The Governor in that case would undoubtedly act in his usual manner, which is to follow the advice of his ministers, unless some very clear Imperial interest were involved, such an Imperial interest not of course being the interest of the Imperial Government in the maintenance of any particular judicial arrangements in the Colonies, but the chance that the action would injuriously affect the Empire as a whole.

Colonial instances of removal are as rare as at home. In the Dominion of Canada three cases have been discussed in which the removal of provincial judges has been considered. In two cases, those of Quebec judges, Lafontaine[1] and Loranger,[2] a Committee of the House of Commons was appointed, but its report showed that no adequate case existed for further proceedings ; in the case of Wood C.J. of Manitoba,[3] a committee, though asked for, was not granted.

The whole question of the position of the Crown in those cases in which the power of removal of judges is vested in the Crown on the addresses of the Houses of Parliament, and not in the Governor, was considered by the law officers of the Crown in the case of Judge Boothby of South Australia, whose removal was asked for by the two Houses of the Colony on the ground of the confusion into which his extraordinary views had thrown the Colonial administration and the course of justice. On that occasion, though Mr. Boothby was asked to appear and did appear before a committee appointed by the Lower House to explain his views, the two Houses merely sent up addresses, the one from the Upper House

[1] Canada *House of Commons Journals*, 1867–8, pp. 297, 344, 398 ; 1869, pp. 135, 247.

[2] Ibid., 1877, pp. 20, 25, 36, 132, 141, 158, App. No. 3.

[3] Ibid., 1882, pp. 176, 192, 355 ; *Sess. Pap.*, 1882, No. 106, which gives the C.J.'s defence ; *House of Commons Debates*, 1882, pp. 1234–7.

asserting that his removal was absolutely necessary, the other from the Lower House declaring that through his action public confidence in his administration of the law of the province was destroyed. The Law Officers were referred to for advice as to whether the Queen could dismiss Mr. Boothby on the strength of the addresses sent home, and whether she had a discretion in the matter; also whether, if removal were decided upon, it should be on the grounds that the Legislature must be assumed to have acted with reason, or on the grounds disclosed in the evidence taken before the committees of the Houses and their report; it was also asked if any appeal would lie from a dismissal, and if the fact that there had been two addresses instead of one, as called for in the exact wording of the Act, would make any difference. The law officers advised that there was no objection to separate addresses or to the absence of specific charges in the addresses, provided that the Queen was satisfied that ground existed for dismissal—the Crown had always a discretion to remove or not in consequence of such an address; but removal would be quite justified if, owing to a judge's perversity or habitual disregard of judicial propriety, the administration of justice were practically obstructed; no appeal to the Privy Council would lie, and in this case they did not recommend dismissal because the difficulties which had arisen were to some extent real, in view of the Governor assenting to Acts which should have been reserved, and in addition, strictly speaking, the Houses when they passed the addresses were not lawfully constituted, owing to the invalidity of the Electoral Act, No. 10 of 1856, under which they were elected, although that defect was cured by an enactment *ex post facto* validating all the acts of the Legislature.[1]

In the case of the Crown Colonies one mode of removal, which was approved in 1870 by the Judicial Committee of the Privy Council,[2] and has been very convenient, was that

[1] See *Parl. Pap.*, August 1862; above, Part III, chap. iii. In 1866 another attempt to remove him by address failed, the Privy Council agreeing with the Law Officers, and he was therefore in 1867 amoved by the Governor in Council; South Australia *Parl. Pap.*, 1867, Nos. 22, 23, 41.

[2] *Parl. Pap.*, C. 139.

the Governor with the advice of the Executive Council should, under the Royal Commission and Instructions, suspend a Colonial judge, which suspension became dismissal if confirmed by the Queen, who would obtain normally the advice of the Judicial Committee. These powers extended to all judges holding during pleasure; the same method was considered applicable by Sir Frederick Rogers, in the absence of any provision excluding its operations, to judges holding during good behaviour. The procedure was regarded as being a convenient one by the Privy Council, as it enabled full investigation to take place in the Colony, so that the Judicial Committee was in a position to deal with the matter apprehensively and finally when it came before it, whereas if representations were made by Colonial legislatures the question came before the Privy Council in a very incomplete and unsatisfactory state, as the judge whose conduct was impugned had seldom sufficient opportunity to answer properly the charges made against him.

The question of the applicability of this procedure to a judge in the self-governing Colonies was considered in 1864 and 1865 in the case of Victoria.[1] Sir Redmond Barry C.J. at the beginning of 1864 informed the Governor that he intended to take leave of absence. The Governor referred the matter to Mr. Higinbotham, who was then Attorney-General, and he advised that judges had not the right to take leave without permission,[2] nor to report it direct to the Governor. Finally the Executive Council directed that the Attorney-General should be addressed by the judge as the responsible minister at the head of the department to which the Supreme Court was attached.

Then a further source of difficulty arose; by a local Act,

[1] Cf. Morris, *Memoir of George Higinbotham*, pp. 112–6.

[2] Cf. Forsyth, *Cases and Opinions on Constitutional Law*, pp. 78 seq. The Acts regulating leave and requiring the assent of the Governor in Council were altered by 57 & 58 Vict. c. 17, which exempts the self-governing Colonies (the new Colonies and Federations since 1894 have been added to the schedule by Order in Council) from the control of the Secretary of State, which was substituted by that Act for the provisions of 22 Geo. III. c. 75.

15 Vict. No. 10, s. 5, there was a clause empowering the Governor in Council to suspend judges. The judges maintained that the clause was not in force, and, when the Attorney-General in consolidating the statutes regarding the Supreme Court inserted it, the Chief Judges claimed that he ought not to do so. When the Bill came before Parliament the Legislative Assembly passed the clause, and the Council amended it. The Assembly refused to accept the amendment, and when the Bill returned to the Council it was thrown out. Finally, the four judges asked that the point should be referred to the Judicial Committee. The petition was forwarded to England at the end of September 1865. The Judicial Committee was unwilling to pronounce an opinion on abstract questions of law, but the Secretary of State for the Colonies obtained an opinion from the Law Officers of the Crown, then Sir Roundell Palmer and Sir R. P. Collier, which was in accordance with the views of the Law Officers of Victoria, and not with that of the judges.

The opinion was to the effect that the Governor in Council could still amove judges under Burke's Act, and they thought that on the whole they could still suspend judges under the local Act of 1852, the power of suspension for the causes therein mentioned being not inconsistent with the tenure of the office during good behaviour. The result was that the judges consented to correspond with the minister. But it must be admitted that doubt will be felt as to whether the opinion of the Law Officers is really correct.

That Burke's Act should still be in force when another statute gives a different power to the Governor seems at least improbable, and that the local Act should have continued to be operative after the passing of the Constitution Act would seem also to be a rather strained interpretation.[1]

[1] Contrast the opinion of the Law Officers in a Queensland case, that a Governor cannot suspend a judge holding during good behaviour even when he could amove, cited in Todd, op. cit., ii. 896; Quick and Garran, op. cit., p. 733. In Victoria the power of suspension was, however, continued in the consolidation of the statutes, and is now found in the *Supreme Court Act*, 1890, ss. 13 and 14. It has never been used; cf. Jenks, *Govern-*

Nor does it seem likely that apart from the existence of the local Act removal after suspension will in any case be adopted; and it must be admitted that it would be very doubtful whether it could possibly be held that the legal right existed, though a discussion of a right which is not likely ever to be exercised cannot altogether be satisfactory.

In the exercise of his functions a Colonial judicial officer is exempt from suit on the same principles as apply to an Imperial judge.[1]

ment of Victoria, pp. 318, 319. The New Zealand Act of 1908, No. 89, ss. 8 and 9, allow the King on address to remove and the Governor in Council to suspend on address or provisionally if Parliament is not sitting until the end of the next session. The Nova Scotia Act of 1848, c. 21, provided for removal on an address with an appeal to the Privy Council, a curious mixture. Cf. Canada Acts, 7 Vict. c. 15; 12 Vict. c. 63, s. 4.

[1] Cf. *Haggard* v. *Pelicier Frères*, [1892] A. C. 61; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668, which establishes the immunity of a judge even if he act perversely and maliciously if he acts within his jurisdiction; *McLennan* v. *Hubert*, 22 L. C. J. 294; *Scott* v. *Stansfield*, 3 Ex. 220.

CHAPTER II

ADMIRALTY JURISDICTION

ADMIRALTY jurisdiction[1] in civil matters has been simplified and extended by the *Colonial Courts of Admiralty Act*, 1890,[2] under s. 2 of which every Court of law in a British possession which is for the time being declared to be a Court of Admiralty and which has therein original unlimited civil jurisdiction shall be a Court of Admiralty, and for the purposes of this Admiralty jurisdiction exercise all the powers which are possessed in its ordinary jurisdiction. The jurisdiction of a Colonial Court of Admiralty is assimilated by the Act to the Admiralty jurisdiction of the High Court in England, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations. Any references to Vice-Admiralty Courts in Imperial or Colonial enactments are to apply to Colonial Courts of Admiralty, with the necessary changes of terminology, but the jurisdiction under the *Naval Prize Act*, 1864, and under the *Slave Trade Act*, 1873, which is conferred exclusively on the High Court of Admiralty or the High Court of Justice, as distinct from the Vice-Admiralty Courts, shall not be

[1] Under this head will also be treated jurisdiction conferred by Imperial Acts in other matters not technically Admiralty jurisdiction. Cf. Quick and Garran, *Constitution of Commonwealth*, pp. 797 seq.

[2] As regards criminal offences the *Admiralty Offences (Colonial) Act*, 1849, rules the position; the Act of 1890 was intended to simplify and extend the civil jurisdiction of Colonial Courts, and to supersede the Imperial Vice-Admiralty Courts already existing, which were regulated by the Acts 26 & 27 Vict. c. 24 and 30 & 31 Vict. c. 45. Cf. *Barton* v. *The Queen*, 2 Moo. P. C. 19; *Rolet* v. *The Queen*, 1 P. C. 198. Piracy is justiciable by the Colonial Courts also by international law, and see Forsyth, *Cases and Opinions on Constitutional Law*, pp. 90–118.

exercised by the Colonial Court of Admiralty, and no prize jurisdiction shall be exercised without special authority, which may however be given under the *Prize Courts Act*, 1894. Further, the Court has no jurisdiction to try under the Act any person for an offence punishable on indictment under the English law, and its powers as to the laws and regulations relative to the navy are to be those only which are conferred by Order in Council.

The legislature of the British possessions may declare any Court of unlimited civil jurisdiction, whether original or appellate in that possession, to be a Colonial Court of Admiralty, and may limit its jurisdiction territorially or otherwise, and may confer upon any inferior Court in the possessions such partial Admiralty jurisdiction as it thinks fit, provided always that any such law shall confer jurisdiction which is not by the Act of 1890 conferred upon a Colonial Court of Admiralty. All Colonial laws made in pursuance of the Act, or laws affecting the procedure in a Colonial Court of Admiralty in respect of the jurisdiction conferred by the Act, must either be reserved or contain a suspending clause, unless previously approved by the Crown [1] through a Secretary of State. The appeal from a judgement of any Court in a British possession in the exercise of the jurisdiction conferred by the Act after a decision of local appeal, lies to the Queen in Council, and the right of appeal can be granted in any case,[2] and Orders in Council by the Queen or the Judicial Committee with regard to appeals shall be valid throughout all Her Majesty's dominions. Rules of Court regulating the procedure can be made by the same authority that makes rules for the ordinary procedure of the Court, but such rules must not relate to the slave trade, and can only come into operation if approved by the King in Council, but when so approved shall have the same force as if they were enacted

[1] As was the Canada Act (*Revised Statutes*, 1906, c. 141) regarding such jurisdiction in 1906. The Act, 54 & 55 Vict. c. 29, had a suspending clause.

[2] Such an appeal lies from the Supreme Court of Canada as of right, *Richelieu and Ontario Navigation Co.* v. *SS.* '*Cape Breton*', [1907] A. C. 115; so in the *South Africa Act*, 1909, s. 106.

in an Imperial Act. But the Order in Council may give authority to vary the rules there laid down in matters of detail or of local concern without requiring confirmation by Order in Council.

Power is retained to the Crown by commission under the Court Seal to empower the Admiralty to establish in a British possession any Vice-Admiralty Court or Courts.[1] The Admiralty if so empowered may appoint the judge and officers of the Court, and may vest in the Court the power which is conferred by the Act upon the Courts of that possession, and while the power is so vested the powers of the other Courts shall be suspended. But the power is limited with regard to British possessions having a representative legislature to questions of jurisdiction in prize, the navy, the slave trade, matters dealt with in the *Foreign Enlistment Act*, 1870, or the *Pacific Islanders Protection Acts*, 1872 and 1875, and matters in which questions arise relating to treaties or conventions with foreign countries and to international law. From such Vice-Admiralty Courts appeal lies to the Queen in Council. Vice-Admiralty Courts shall be abolished by the Admiralty if the Queen by commission so directs. The Governor, however, of a British possession is still *ex officio* Vice-Admiral if no other person is appointed.[2]

S. 8 of the Act provides as follows with regard to droits of Admiralty and of the Crown :—

(1) Subject to the provisions of this section nothing in this Act shall alter the application of any droits of Admiralty or droits of or forfeitures to the Crown in a British possession;

[1] In the Canadian case of *Attorney-General* v. *Flint*, 16 S. C. R. 707, 3 N. S. 453, it was held that the Canadian Parliament could legally impose duties and grant powers to a Vice-Admiralty Court, though not established under its aegis. Of course such an Act could have been disallowed had the Crown objected, cf. Webb, *Imperial Law in Victoria*, p. 68. This fact is recognized in 53 & 54 Vict. c. 27, s. 2 (3). See also 57 & 58 Vict. c. 39.

[2] In the Commonwealth the High Court has as yet not been invested with Admiralty jurisdiction, and the Governor-General is not Vice-Admiral. The Parliament can confer on it such jurisdiction, s. 76 (iii) of the Constitution; apparently the jurisdiction would be limited by the Act of 1890, though Quick and Garran, p. 800, think not. Cf. 11 C. L. R. 689, at p. 715,

and such droits and forfeitures, when condemned by a Court of a British possession in the exercise of the jurisdiction conferred by this Act, shall, save as is otherwise provided by any other Act, be notified, accounted for, and dealt with in such manner as the Treasury from time to time direct, and the officers of every Colonial Court of Admiralty and of every other Court in a British possession exercising Admiralty jurisdiction, shall obey such directions in respect of the said droits and forfeitures as may be from time to time given by the Treasury.

(2) It shall be lawful for Her Majesty the Queen in Council by Order to direct that, subject to any conditions, exceptions, reservations, and regulations contained in the Order, the said droits and forfeitures condemned by a Court in a British possession shall form part of the revenues of that possession either for ever or for such limited term or subject to such revocation as may be specified in the Order.

(3) If and so long as any of such droits or forfeitures by virtue of this or any other Act form part of the revenues of the said possession, the same shall, subject to the provisions of any law for the time being applicable thereto, be notified, accounted for, and dealt with in manner indicated by the Government of the possession, and the Treasury shall not have any power in relation thereto.

The Act was at once adopted in all the Dominions [1] with the exception of New South Wales and Victoria, which preferred in 1890 to retain the old Vice-Admiralty Courts established therein. New South Wales and Victoria followed suit in 1911 under an Order in Council of May 4. There was no clear advantage in the retention of these Courts, for the powers conferred on the Colonial Court of Admiralty are amply sufficient for all purposes, and the procedure of the Vice-Admiralty Courts is more complicated than that elsewhere in force. In the case of the Commonwealth the Admiralty jurisdiction of the State Courts is still vested in them, for the Commonwealth High

[1] For Canada cf. *House of Commons Debates*, 1910–1, pp. 2218 seq.; 1891, pp. 1417 seq. Canada had in 1877 established a Maritime Court for Ontario and Quebec (40 Vict. c. 21) with jurisdiction in civil cases (excluding prize, revenue, piracy, and navy, &c.) extending to the great lakes, and its legality was asserted in *McCuaig & Smith* v. *Keith*, 4 S. C. R. 648.

Court is not as constituted a Colonial Court of Admiralty within the meaning of the Act of 1890, though it can be given Admiralty jurisdiction by a Commonwealth Act under s. 76 (iii) of the Constitution. Appeals lie from the State Courts in their Admiralty jurisdiction direct to the Privy Council, or alternatively to the Commonwealth High Court, but not presumably in the case of New South Wales and Victoria, while the Courts were Imperial Courts and not Colonial Courts. In Canada the Court of Exchequer has Admiralty jurisdiction under *Revised Statutes*, 1906, c. 141; it has been discussed but not decided whether the Court has only jurisdiction in Admiralty causes arising in Canadian waters, or in all Admiralty causes wherever arising.[1] There is also doubt as to the Admiralty jurisdiction on the great lakes, which is claimed by the United States Courts.[2]

With regard to the provisions of s. 8 no Orders in Council have yet been issued as contemplated in subsection 2, but it is clear from the Imperial Constitution Acts of New South Wales and Victoria of 1855 (18 & 19 Vict. cc. 54 and 55) that the droits in question have already been surrendered by the Crown; the same remark applies to Queensland in so far as the Act of 1861 (24 & 25 Vict. c. 44) expressly confirms the Queensland Letters Patent of June 6, 1859, and those letters patent contain the same provisions as in the case of New South Wales. In the case of Tasmania (18 Vict. No. 17) and South Australia (No. 2 of 1855–6) the position is much more doubtful, for though those Acts have been validated *ex post facto* by Imperial Acts, the validation seems rather to have been a validation of their enactment as Colonial Acts and not the giving of Imperial validity to their provisions in such manner as to affect the provisions of other Imperial Acts. In the case of Western Australia apparently s. 64

[1] Above, pp. 376, 377. The former view is supported by *Bow, McLachlan & Co.* v. *Ship 'Camosun'*, [1909] A. C. 597, where the view is taken of the identity of the English and Canadian Courts.

[2] *The Hine* v. *Trevor*, 4 Wall. 555. See Canada *Sess. Pap.*, 1877, Nos. 17, 54; Act 40 Vict. c. 21, s. 1; 54 & 55 Vict. c. 29, s. 3; Gray, *Journ. Soc. Comp. Leg.*, xii. 41–3. (*R.* v. *Sharp*, 5 P. C. 135, is a false reference.)

of the Constitution Act, 1889, which was confirmed by the Imperial Act of 1890 (53 & 54 Vict. c. 26), is not sufficient to transfer these droits. In the case of the other Dominions it is doubtful whether there is any legislation sufficient to transfer the droits—for the transfer of such droits was not included in the Act of 1852 (15 & 16 Vict. c. 39), which authorized transfer of other royal revenues; but the whole question is one merely of historical interest, for in point of fact the droits are not remitted to the Imperial Treasury, and the New Zealand *Shipping and Seamen's Act*, 1908, and the Commonwealth Navigation Bill alike purport to vest in the Dominions and the Commonwealth respectively the proceeds of all droits.

In one set of cases with regard to merchant shipping legislation appeals do not lie to the Privy Council, but appeals lie from inquiries as to shipwrecks, &c., to the High Court in England under s. 478 of the *Merchant Shipping Act*, 1894, but no appeal is permitted from any order or finding on an inquiry into a casualty affecting the shipping registered in a British possession or from a decision affecting the certificate of a master, mate, or engineer, if it has not been granted in the United Kingdom or in another British possession. Rules regulating such appeals can be made by the Lord Chancellor, and have then Imperial validity.[1]

In addition to the Admiralty jurisdiction conferred by the Act of 1890, a certain extended jurisdiction is conferred upon Colonial Courts by ss. 686 and 687 of the *Merchant Shipping Act*, 1894, re-enacting earlier legislation, which is as follows :—

686. (1) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas or in any foreign port or harbour or on board any foreign ship to which he does not belong, or, not being a British subject, is charged

[1] In the Commonwealth, under the Navigation Bill, this appeal appears to be intended to disappear as regards coasting and registered vessels; cf. Canada Act, 1908, c. 65.

with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that Court shall have jurisdiction to try the offence as if it had been so committed.

(2) Nothing in this section shall affect the *Admiralty Offences (Colonial) Act*, 1849.[1]

687. All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same Courts and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England : and the costs and expenses of the prosecution of any such offence may be directed to be laid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.

Moreover, it is provided in s. 478 [2] of that Act that

The legislature of any British possession may authorize any Court to make inquiries as to shipwrecks or other casualties affecting ships or as to charges of incompetency or misconduct on the part of a master, mate, or engineer of ships in the following cases, viz. :

(*a*) Where a shipwreck or casualty occurs to a British ship on or near the coasts of the British possession or to a British ship in the course of a voyage to a port within the British possession :

(*b*) Where a shipwreck or casualty occurs in any part of the world to a British ship registered in the British possession :

(*c*) Where some of the crew of a British ship which has

[1] See 30 & 31 Vict. c. 124, s. 11 ; 18 & 19 Vict. c. 91, s. 21.

[2] Formerly 17 & 18 Vict. c. 104, s. 242, and 25 & 26 Vict. c. 63, s. 23, made provision, but inadequately, according to the decision in *in re Victoria Steam Navigation Board, ex parte Allan*, 7 V. L. R. 248 ; the defect was remedied in 45 & 46 Vict. c. 76.

been wrecked or to which a casualty has occurred, and who are competent witnesses to the facts, are found in the British possession :

(*d*) Where the incompetency or misconduct has occurred on board a British ship on or near the coasts of the British possession, or on board a British ship in the course of a voyage to a port within the British possession :

(*e*) Where the incompetency or misconduct has occurred on board a British ship registered in the British possession :

(*f*) When the master, mate, or engineer of a British ship who is charged with incompetency or misconduct on board that British ship is found in the British possession.

An inquiry is not to be held if an inquiry has been held by a competent Court in any part of the Dominion, or in respect of which the certificate of a master, mate, or engineer has been cancelled or suspended by a Naval Court. No investigation is to be held when one has been commenced in the United Kingdom. The Colonial Court shall have the same powers of cancelling and suspending certificates as a Court in the United Kingdom; and the Board of Trade may order a rehearing ; but if such order is not made, or is refused, an appeal lies to the High Court in England as mentioned above.

Under the Act of 1849 Colonial Courts were given power to deal with treason, piracy, felony, robbery, murder, or any other offence committed on the sea or in any place within Admiralty jurisdiction, if the accused is within the Colony, in the same way as if the offence were committed within the meridian limits of the several Colonies and the local jurisdiction of the Courts.[1] The penalty under a law of 1874 is to be the local penalty for an offence committed in the Colony or a corresponding penalty to the English penalty.[2]

This jurisdiction extends to vessels even if they are within

[1] 12 & 13 Vict. c. 96, s. 1. For offences committed at sea through which the person injured dies on land, see s. 3. See also 28 Hen. VIII. c. 15 ; 11 Will. III. c. 7 ; 46 Geo. III. c. 54. The Act of 1849 saves the provisions of 9 Geo. IV. c. 83, respecting New South Wales and Tasmania.

[2] 37 & 38 Vict. c. 27, s. 3. Passed on account of the gross miscarriage of justice *Reg.* v. *Mount*, 6 P. C. 283.

a foreign country, if they are on navigable rivers,[1] and even in respect of foreigners whether on the high seas [2] or on a navigable river.[3] The jurisdiction did not by common law extend over a foreigner in a foreign ship in territorial waters, according to the famous decision in *Reg.* v. *Keyn*,[4] but this limitation was abolished by the *Territorial Waters Jurisdiction Act*, 1878 (41 & 42 Vict. c. 73), which allows the offences to be punished as an offence within the jurisdiction of the Admiral, but the consent of the Governor of a Colony is necessary for a prosecution. It is doubtful if the provisions of this Act are essential for the Colonies, as the Act is in part declaratory, and in any case the judgement of the Central Criminal Court is not binding on Colonial Courts.[5]

Further jurisdiction on Colonial Courts is conferred by the *Army Act*, 1881 (ss. 154 and 168), the *Coinage Offences (Colonial) Act*, 1851, the *Coinage Act*, 1870, the *Official Secrets Act*, 1911, the *Pacific Islanders Protection Acts*, 1872 and 1875, the *Foreign Enlistment Act*, 1870, the Acts respecting treason (35 Hen. VIII. c. 2 ; 36 Geo. III. c. 7 ; 11 Vict. c. 12), the *Extradition Acts*, 1870 and 1873, which empower the Legislatures of the Dominions to create Courts for the hearing of such cases from which Courts appeals lie in the usual manner, the *Fugitive Offenders Act*, 1881, the *Slave Trade Acts*, the Act to enforce the Behring Sea award, 1894, and other Imperial Acts.[6]

[1] *Reg.* v. *Anderson*, 1 C. C. 161 ; *Reg.* v. *Carr*, 10 Q. B. D. 76 ; *Reg.* v. *Armstrong*, 13 Cox, C. C. 185.

[2] *Reg.* v. *Lopez*, *Reg.* v. *Sattler*, 27 L. J. M. C. 48.

[3] *Reg.* v. *Anderson*, 1 C. C. 161.

[4] 2 Ex. D. 63 ; 46 L. J. M. C. 17.

[5] See s. 5 of the Act. *Contra*, Ilbert in Jenkyns's *British Rule and Jurisdiction*, p. 12, n. 2. Dutch and other foreign vessels have been seized and condemned for fishing and other offences in territorial waters in Australia without invoking the terms of the Act. See also *R.* v. *Kahitaska*, 8 W. A. L. R. 154, which discusses the question of Admiralty jurisdiction in territorial waters ; *R.* v. *Cunningham Bell*, C. C. 72.

[6] For such Acts cf. above, Part V, chap. xii.

CHAPTER III

JUDICIAL APPEALS

§ 1. The Prerogative in the Dominions

The prerogative of the Crown to hear appeals from the Courts of the Dominions is undoubted[1], and in that sense is definitely recognized by the Commonwealth Constitution, s. 74 of which expressly contemplates the right of the Crown to grant by the prerogative special leave of appeal, and it is also contemplated in the *South Africa Act*, 1909, s. 106.[2] It rests, however, also on a statutory basis, for, by the *Judicial Committee Act*, 1844,[3] a right is given to admit appeals from any Court in the Dominions whatever, whether or not the Court is a Court of Error. This Act was passed, as the preamble states, because doubt had been raised as to whether an appeal could be brought from any Court but a Court of Appeal in certain cases in which it had been laid down that appeals should only lie from the Court of Errors.[4] The Act in question, though mainly passed for the purpose of permitting appeals from every and any Court, has had incidentally the effect of providing by statute for the right to admit appeals from every Court in the Dominions.

The result of this statute has been to prevent the right

[1] Cf. *Falkland Islands Co.* v. *The Queen*, 1 Moo. P. C. (N. S.) 299; *Reg.* v. *Bertrand*, 1 P. C. 520; *in re Lord Bishop of Natal*, 3 Moo. P. C. (N. S.) 115, at p. 156; *in re Wi Matua's Will*, [1908] A. C. 448; *Cushiny* v. *Dupuy*, 5 App. Cas. 409; *Canadian Pacific Railway Co.* v. *Toronto Corporation and Grand Trunk Railway of Canada*, [1911] A. C. 461.

[2] So also in Canada by the Act of 1875 (38 Vict. c. 11, s. 47), to constitute the Supreme Court. Cf. *Johnston* v. *Ministers &c. of St. Andrew's Church, Montreal*, 3 App. Cas. 159.

[3] 7 & 8 Vict. c. 69, s. 1. As regards Admiralty appeals, see chap. ii.

[4] *In re Assignees of Manning*, 3 Moo. P. C. 154; *in re Cambridge*, 3 Moo. P. C. 175; Safford and Wheeler, *Privy Council Practice*, p. 713.

to hear appeals being barred in any case whatever unless it is barred by an Imperial Act.[1]

The use of the power of Colonial Legislatures to affect this prerogative has been the source of some confusion. In the case of *Cuvillier* v. *Aylwin*[2] it was held that the right of appeal could be taken away by the Crown with the assistance of the Legislature of Lower Canada. As a matter of fact, in that case the decision was clearly wrong, for the statute of Lower Canada[3] in question expressly preserved the right of prerogative. The case came up again *in re Louis Marois*,[4] and it was also mentioned in *Cushing* v. *Dupuy*,[5] but all that was affirmed in these cases is simply that the only means of taking away the prerogative is by express words. It is clear that, prior to the passing of the Act of 1844, the prerogative in so far as it was not statutory could have been barred by Colonial Acts, and the Act of 1844 recognizes that it had been so barred, but it is equally clear that, since the passing of that Act, the only power of barring it is by an Act of the Imperial Parliament or by an Act approved by an Imperial Act.

As a matter of fact, there is on record one Canadian Act of 1888 which purports to extinguish all right of appeal in criminal cases.[6] That statute has been several times quoted as a case where the prerogative has been barred, but it is perfectly clear, in view of the Imperial Act of 1844,[7] that the

[1] This fact is, curiously, not alluded to in most of the authorities. But the Act No. 8 of 1908 of Natal setting up a special Court to try Dinizulu did not even attempt to bar an appeal to the Privy Council.

[2] 2 Knapp, 72. [3] 34 Geo. III. c. 6, s. 43.

[4] 15 Moo. P. C. 189.

[5] 5 App. Cas. 409. Cf. Lefroy, *Legislative Power in Canada*, pp. 181–4; Harrison Moore, *Commonwealth of Australia*,[2] p. 232.

[6] 51 Vict. c. 43; now in *Revised Statutes*, 1906, c. 146, s. 1025. See *House of Commons Debates*, 1887, pp. 644–6 (50 & 51 Vict. c. 50); 1888, p. 942; *Sess. Pap.*, 1889, No. 77. The New South Wales Criminal Appeal Bill of 1911 makes a similarly ineffective attempt, and also tries to evade the application of s. 73 of the Constitution by creating a Criminal Appeal Court, which is not to be the Supreme Court; *Debates*, 1911, pp. 1772 seq.

[7] Wheeler's view (*Confederation Law*, p. 34) that only an Imperial Act could bar the right as it is exercised in England is certainly wrong, though Quick and Garran, *Constitution of Commonwealth*, p. 762, seem to affirm it.

attempt to bar the prerogative has not been effectual, and that the prerogative could still be exercised. It is, however, a matter of no substantial consequence, as criminal appeals are always open to serious objection, and are very rarely entertained by the Privy Council, and it is not therefore likely that such an appeal will again be permitted.[1] That it could legally be permitted is certain. Power is given to the Parliaments of the Commonwealth by s. 74 of the Constitution, and of the Union of South Africa by s. 106 of the *South Africa Act*, to limit the subjects with regard to which special leave of appeal may be granted, but Bills under this power must be reserved, and no such Bill has yet been introduced even into the Parliament of the Commonwealth. Under this power it would be impossible to abolish the power —for limitation is not abolition—but it could be practically reduced to almost *nil*.[2]

The power of hearing appeals thus belonging to the Crown is exercised in two ways ; on the one hand a code of rules is laid down permitting appeals as of right, that is to say, appeals which automatically take place if the conditions laid down are fulfilled,[3] while in addition it is open to any defeated suitor to ask the Privy Council to give him special leave to appeal from the decision of any Court whatever. The rules in the first case normally apply only to the final Court of Appeal, as it is not usual that appeals should lie as of right from two Courts in one Dominion. There is an exception to this in the case of Quebec and New Zealand, where appeals lie both from the Court of Appeal and the Supreme Court. In the case of South Australia appeals as of right lay only from the Supreme Court, as there was in that Colony a Court of Appeal consisting of the Governor, with what was practically the Executive Council, but which now is hardly ever used.

[1] Cf. *Falkland Islands Co.* v. *Reg.*, 1 Moo. P. C. (N. S.) 299, at p. 312 ; *in re Dillet*, 12 App. Cas. 459 ; *Riel* v. *Reg.*, 10 App. Cas. 675 ; *Tshingumuzi* v. *Attorney-General of Natal*, [1908] A. C. 248.

[2] Quick and Garran, op. cit., p. 713.

[3] The leave which is always needed is then granted by the Colonial Court. If there are no rules, or the rules do not cover the point, special leave must be asked. Cf. *Gillett* v. *Lumsden*, [1905] A. C. 601.

The regulations in question were normally laid down by Order in Council, but sometimes, as even now in the case of Ontario and Quebec, by local Acts, while in the case of New South Wales the rules were originally contained in the Charter of Justice of 1823, in the case of Tasmania in the Charter of Justice of 1831, and in the case of the Cape in the Charter of Justice of May 4, 1832. Similarly the provisions in Newfoundland rested on the Charter of Justice of 1825 and on the *Judicature Act* of 1904. In the Province of Prince Edward Island there were no rules at all in force, and all appeals had to be brought by special leave. There were many differences in the provisions of these rules, though on the whole they agreed in substance. They provided for appeals as of right in important cases—the sums involved being, as a rule, from £300 to £2,000—prescribed limits of time, payment of costs, &c.

Appeals by special leave were required in all criminal cases and in those civil cases which did not fall within the rules laid down for appeals as of right. The principles which regulate the granting of leave to appeal in such cases are that some important question of law should be involved, or that some important right should be in question. Appeals as of special leave are never granted for points of form, and in the case of the more important Colonies appeals are not granted except when there is a strong case for assuming that further investigation is necessary. Even so appeals by special leave frequently result in the confirmation of the original judgement.

In the case of the Dominion of Canada and the Commonwealth of Australia, appeals lie direct to the Privy Council from the states and provinces. Appeals also lie under the Dominion *Supreme Court Act*, and the Commonwealth *Judiciary Act*, from those Courts to the Supreme Court of Canada and the High Court of Australia. The defeated party in any suit has therefore the option of carrying his appeal to the Privy Council or to the Supreme Court or the High Court, and the Privy Council have naturally adopted the rule that they will not normally grant special leave to appeal—for no

appeal lies as of right from the Supreme Court of Canada, although legally such appeal could be allowed under the Act of 1844 [1]—permitting a defeated party who has chosen to go to the Supreme Court first to appeal to the Privy Council. On the other hand, a party who has been taken to the Supreme Court and defeated there will more readily be allowed an appeal to the Privy Council. But in the case of the Commonwealth and Canada alike it has been laid down by the Privy Council that appeals will only be allowed where the case is of gravity, involving matters of public interest or some important question of law as affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.[2] Nor will the Privy Council allow appeals where the judgement appears to be plainly right, or at least not to be attended with serious doubt, or for an abstract question.[3]

As a result of the Colonial Conference [4] of 1907 important simplifications have been made in the procedure of the Courts.

The fifth resolution arrived at by the Colonial Conference on the subject of judicial appeals was to the effect—

(1) That it is expedient that the practice and procedure of the Judicial Committee of the Privy Council should be definitely laid down in the form of a code of rules and regulations.

(2) That in the codification of the rules regard should be had to the necessity for the removal of anachronisms and anomalies, the possibility of the curtailment of expense, and the desirability of the establishment of courses of procedure which would minimize delays.

[1] Not so in Australia or the Union, where the exclusion of other appeals rests on an Imperial Act, whereas in Canada it rests only on a Dominion Act.

[2] Cf. *Daily Telegraph Newspaper* v. *McLaughlin*, [1904] A. C. 777. Cf. *Prince* v. *Gagnon*, 8 App. Cas. 103; *Carter* v. *Molson*, ibid., 530; *Clergue* v. *Murray, ex parte Clergue*, [1903], A. C. 521; *Canadian Pacific Railway Co.* v. *Blair*, [1904] A. C. 453; *Victorian Railway Commissioners* v. *Brown*, [1906] A. C. 381.

[3] *Rex* v. *Louw*, [1904] A. C. 412.

[4] *Parl. Pap.*, Cd. 3523, pp. 200 seq. The views of the Dominions are given in Cd. 3524, pp. 179 seq. The subsequent correspondence is in Cd. 5273, pp. 26–41. The practice is given in Safford and Wheeler.

(3) That with a view to the extension of uniform rights of appeal to all Colonial subjects of His Majesty, the various Orders in Council, Instructions to Governors, Charters of Justice, Ordinances, and Proclamations upon the subject of the appellate jurisdiction of the Sovereign should be taken into consideration for the purpose of determining the desirability of equalizing the conditions which give right of appeal to His Majesty.

(4) That much uncertainty, expense, and delay would be avoided if some portion of His Majesty's prerogative to grant special leave to appeal in cases where there exists no right of appeal were exercised under definite rules and restrictions by the Colonial Courts.

In accordance with this resolution a revised draft of rules regarding appeals was drawn up by the Judicial Committee of the Privy Council, and was forwarded to the Dominion Governments in dispatches of August 20, 1908, for their consideration. The rules represented a codification of the rules which then were in force, with simplifications on all possible points. The most important alteration was that it was suggested that every Supreme Court should be entitled to grant leave to appeal at its discretion from any judgement, whether final or interlocutory, if in the opinion of the Court the question involved in the appeal was one which, by reason of its grave general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision. This power will rest with the Court entirely, and will in all possessions except Canada and Australia co-exist with the right of appeal which will, as formerly, exist in the case of final judgements of the Court, where the matter of dispute on appeal amounts to, or is of the value of, a sum which varies in the several cases from £300 in Prince Edward Island to £1,000 in Manitoba—£500 being the most usual amount. This alteration will obviate the necessity which formerly existed of obtaining special leave to appeal from the Privy Council, involving as a rule a double resort to the Privy Council with its attendant inevitable delay and expense. The rule will also permit of the granting of leave

to appeal by the Court in criminal cases,[1] involving points of law in which it is desired to obtain the decision of the Judicial Committee, whereas formerly it was very difficult to obtain a decision of the Judicial Committee on any criminal case, as the Judicial Committee are most unwilling to grant special leave to appeal in such cases, in which the delay of the execution of the sentence of the Court below is usually most undesirable.

To save expense and delay it is also provided that a Colonial Court may permit an appellant, to whom final leave to appeal has been granted, to withdraw his appeal prior to the dispatch of the record to England, a power which formerly Colonial Courts do not appear to have had, and that if an appellant, having obtained final leave to appeal, fails to show due diligence in taking the necessary steps for the purpose of procuring the dispatch of the record to England, the respondent may, after giving the appellant due notice of his intended application, apply to the Court for a certificate that the appeal has not been effectually prosecuted by the appellant, and if the Court sees fit to grant such a certificate, the appeal shall be deemed as from the date of such certificate to stand dismissed for non-prosecution without express order of His Majesty in Council. Several of the Dominion or State Governments had pointed out that the matter dealt with by the latter rule was the cause of much of the delay in prosecuting appeals. Provision is also made that where, at any time between the order granting final leave to appeal and the dispatch of the record to England, the record becomes defective by reason of the death or change of status of a party to the appeal, the Court may, notwithstanding the order granting final leave to appeal, on an application made by any person interested, grant a certificate showing who is the proper person to be substituted in place of, or in addition to, the party who has died, or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted, with-

[1] Cf. under the Transvaal Order in Council of 1909, *Hong Kong and Leung Quin* v. *Attorney-General*, [1910] T. P. 432.

out express order of His Majesty in Council, thus obviating again the expense and the delay of procuring a formal Order in Council.

Generally the rules are based on the assumption that the Court appealed from is the best qualified to deal with any questions that may arise in connexion with the appeal up to the dispatch of the record to England, and they seek accordingly to invest the Court with all necessary powers for that purpose, especially in the cases when some time elapses between the final order granting leave to appeal and the dispatch of the record, when, in some cases, it had been held the Court had no power to take any steps that may be necessary to meet altered circumstances.

In sending the rules in draft to the Dominion Governments it was pointed out that the rules, after adaptation to local circumstances, could either be enacted by the Dominion Parliaments, or might be issued in the form of an Order in Council. It was suggested that the latter form of procedure would probably be the more convenient, as permitting alterations to be made in the rules at the request of the Dominion Governments without the delay and trouble of procuring an amending Act of the local Parliament, but it was suggested that, whatever mode of procedure were adopted, a draft of the proposed legislation should be forwarded to the Judicial Committee of the Privy Council, for any observations they might desire to offer on the subject.[1] The procedure by Order in Council was unanimously adopted.

Orders in Council on the lines of the new rules have been issued in respect of the Dominion of New Zealand,[2] Newfoundland, the Provinces of Alberta, Saskatchewan, Nova Scotia, Prince Edward Island, Manitoba, British Columbia, and New Brunswick, in Canada, Queensland, South Australia, New South Wales, Tasmania, Victoria, and Western Australia.

[1] See *Parl. Pap.*, Cd. 5273, p. 26.

[2] There exists in that case a direct appeal by leave of the Court or of the Privy Council from the Supreme Court also, as in some cases no appeal lies from the Supreme Court to the Court of Appeal. For the new Order, cf. *Bowron Bros.* v. *Bishop and another*, 29 N. Z. L. R. 821.

An Order in Council was also issued in respect of the Transvaal before the Union of South Africa was constituted.[1] An Order in Council confined to matters of procedure has been issued in respect of the High Court of the Commonwealth of Australia from which appeals lie only by special leave, and the Appellate Division of the Supreme Court of the Union of South Africa, which is in the same position under s. 106 of the *South Africa Act*, 1909.

In one class of cases the Privy Council will not exercise jurisdiction at all, namely, election petitions, because these are matters referred to Courts in quite a special capacity, and not ordinary judicial matters. This was decided in *Théberge* v. *Landry*,[2] and has been followed by the High Court of Australia in *Holmes* v. *Angwin*.[3]

§ 2. The Limitation of the Prerogative

There has been noted above the Canadian Act which purports to bar the prerogative in criminal cases. This Act stands in a peculiar position, for the Judicial Committee cannot, it is clear, desire to deal with such cases. On the other hand, the proposal of the Dominion Parliament to set up a Supreme Court barring all appeal thence to the Privy Council was abandoned on an intimation that the law would certainly not receive the royal assent.[4] In New Zealand Sir R. Stout has protested energetically against certain judgements of the Privy Council,[5] but the Government has made no move in favour of the weakening of the power of the Court in question. In Australia, however, the limitation of

[1] *Natal Bank, Ltd.* v. *Rood's Heirs*, [1909] T. S. 402; [1910] A. C. 570.

[2] 2 App. Cas. 102. Cf. a land case, *Moses* v. *Parker, ex parte Moses*, [1896] A. C. 245, where it was held that the special character of the jurisdiction (Tasmania Act, 22 Vict. No. 10) forbade an appeal. Cf. 30 N. Z. L. R. 530. Contra, *Reg.* v. *Demers*, [1900] A. C. 103, as regards the Quebec petition of right; *re Robert Barbour*, 12 N. S. W. L. R. 90.

[3] 4 C. L. R. 297.

[4] Lord Norton, *Nineteenth Century*, July 1879, p. 173.

[5] *Wallis* v. *Solicitor-General of New Zealand*, [1903] A. C. 173. See also *Parl. Pap.*, Cd. 3523, pp. 200–30 (discussion of Court at Colonial Conference, 1907); 3524, pp. 179 seq. (complaints of its action); Jebb, *Colonial Nationalism*, pp. 303, 304. Cf. Ewart, *Kingdom of Canada*, pp. 235–45.

the powers of the Court has been to some degree effected by the Constitution of 1900 and an Australian Act, No. 8, of 1907.

It was originally proposed that the High Court to be established for the Commonwealth should be the final Court of Appeal for the Commonwealth.[1] The Adelaide session saw the appeal in every case removed, save that an appeal might be allowed from the High Court only if the public interests of the Commonwealth or a state or any other part of the Queen's dominions were concerned. In the Bill as brought home by the delegates this was modified, and it was proposed to exclude an appeal from any Court, federal or state, in any matter involving the interpretation of the Constitution, or the Constitution of a state, unless the public interests of some part of Her Majesty's dominions, other than the Commonwealth or a state were affected. Exception was taken to this proposal by the Imperial Government, which desired to see the full appeal retained, or at least some less vague limitation imposed, and the objections of that Government were reinforced by reference made to the Colonial Chief Justices by telegram, which solicited the expression of views in favour of the extension of the appeal and the preservation of an appeal in every case from the State Courts, for which Queensland and New Zealand pressed.

Finally both sides compromised, and the section as passed was expressed as follows :

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any state or states, or as to the limits *inter se* of the constitutional powers of any two or more states, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any

[1] Cf. *Commonwealth of Australia Constitution Bill* (Wyman & Sons, 1900), Keith, *Journ. Soc. Comp. Leg.*, ix. 269–80 ; Quick and Garran, *Constitution of Commonwealth*, pp. 242 seq., 750 seq. ; Harrison Moore, *Commonwealth of Australia*,[2] pp. 236 seq. ; *Parl. Pap.*, Cd. 158, pp. 1 seq., 47, 57, 64, 75 seq. ; 188, p. 3 ; Commonwealth *Debates*, 1907, pp. 3755 seq.

special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of her royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

During the debates in the House of Lords on the passing of the Bill it was pointed out by Lord Russell of Killowen [1] that while there was no appeal from the High Court except by its own leave in the special class of cases mentioned, there still existed an appeal from the decision of the State Courts direct to the Judicial Committee, and that a conflict of authority was thereby invited, since it might be held that the decision of the High Court, in a matter in which it could prevent an appeal to the Privy Council, should be regarded as equally final with the decision of the Privy Council in cases brought from a State Court. Mr. Haldane [2] also, in the House of Commons, agreed that there was a possibility of a conflict of authority, but Lord James of Hereford [3] expressed strongly the view that the decision of the Privy Council would prevail, as it was the decision of Her Majesty herself as the fountain of justice, administering justice throughout her Empire at home and abroad.

Lord Davey [4] supported Lord Russell's view, but the other view was accepted by Lord Selborne,[5] Lord Alverstone,[6] and by Sir Robert Finlay.[7]

The Commonwealth *Judiciary Act*, 1903, by which the High Court was constituted, provided by s. 39 (2) that the several Courts of the states should have federal jurisdiction except as provided in s. 38, and subject to conditions that every decision of the Supreme Court of a state in the exercise

[1] *Commonwealth of Australia Constitution Bill*, p. 109.
[2] Ibid., p. 68.
[3] Ibid., p. 108.
[4] Ibid., p. 101.
[5] Ibid., p. 113.
[6] Ibid., p. 117.
[7] Ibid., p. 70.

of its federal jurisdiction should be final and conclusive except in so far as an appeal might be brought to the High Court.

The conflict between the Privy Council and the High Court which had been anticipated was not long delayed. In the income-tax cases *Deakin* v. *Webb* and *Lyne* v. *Webb* [1] the High Court decided that the salary of a federal officer was not liable to state income-tax, overruling a decision to the contrary of the Supreme Court of Victoria. The High Court also declined to give the necessary certificate to enable the matter to be carried to the Privy Council, though the Premiers of the Australian states were anxious that the matter should be taken there, and O'Connor J. had no hesitation in saying that, if it were found that by the current of authority in England it was likely that, should a case go to the Privy Council, some fundamental principle involved might be decided in a manner contrary to the true intent of the Constitution as the Court believed it to be, it would be their duty not to allow the case to go to the Privy Council, and thus to save this Constitution from a risk of what they would consider a misinterpretation of its fundamental principles.

On the other hand, in the case of *Webb* v. *Outtrim* [2] the Privy Council held that a State Parliament could tax the salary of a federal officer. The case had come before the Supreme Court of Victoria,[3] which had followed *Deakin* v. *Webb*, but which granted leave to appeal to the Privy Council under the Order in Council of June 9, 1860, despite the provisions of ss. 38 and 39 of the *Judiciary Act*, 1903.

In reversing the judgement of the Supreme Court the Privy Council dealt with the objection which had been made as to the hearing of the appeal at all by the Privy Council. They accepted the view taken by Hodges J.[4] when the same

[1] 1 C. L. R. 585, overruling *in re Income Tax Acts*, 29 V. L. R. 748. In *Colonial Sugar Refining Co.* v. *Irving*, [1905] A. C. 369, the issue was avoided.

[2] [1907] A. C. 81. So the Supreme Court of Victoria in *Wollaston's* case, 28 V. L. R. 357.

[3] [1905] V. L. R. 463.

[4] Ibid., at p. 467.

objection was raised in the Supreme Court of Victoria that there was no provision in the Commonwealth Act taking away the right of the Supreme Court to grant leave to appeal to the Privy Council, and they endorsed his view that, if the Federal Legislature had passed an Act providing that there should be no right of appeal from a State Court in the matter in question, the Act would have been *ultra vires*, and that it was equally *ultra vires* to accomplish the same result indirectly.

Put more directly, the issue between the High Court and the Privy Council was, whether in the exercise of a new federal jurisdiction (for although the jurisdiction in a great part might have been exercised, and was before the Act of 1903 exercised, as state jurisdiction, it was made entirely federal by the Act of 1903) appeals were regulated by an Order in Council [1] which applied generally to all matters in the State Court, but which was prepared when there was no question of federal jurisdiction at all.

The High Court of the Commonwealth, in the case of *Baxter* v. *The Commissioners of Taxation, New South Wales*,[2] declined to follow the decision in *Webb* v. *Outtrim*. The majority of the Court decided that the High Court was by the Constitution the ultimate arbiter upon all questions as to the limits *inter se* of the constitutional powers of the Commonwealth and a state, unless it was of opinion that the question in any particular instance was one upon which it should follow the guidance of the Privy Council. But though they reconsidered the matter in view of the Privy Council's decision, they were unable to accept the view of that Court. They rested their decision on the ground that as the Constitution made the High Court supreme in questions of the constitutional rights of the states of the Commonwealth, unless it chose to allow an appeal, the Privy Council should have considered itself bound, when a case

[1] For Victoria, June 9, 1860; Queensland, June 30, 1860; South Australia, June 9, 1860; Western Australia, October 11, 1861; New South Wales, November 13, 1850; Tasmania, March 4, 1831.

[2] 4 C. L. R. 1087.

came to it direct from a State Court, to accept the judgement of the High Court. Higgins J.[1] disagreed with the other members of the Court, pointing out that the King in Council was on a higher platform than the High Court, although the High Court might prevent the litigant from ascending the platform, and he quoted the fact that though an appeal never lay to the House of Lords from the Court of Crown Cases Reserved, nevertheless that Court always followed the judgements of the House of Lords. The High Court also held that in the exercise of federal jurisdiction an appeal lay to the Privy Council only by special leave, and not as of right under the Order in Council. They held that, in the case of a new jurisdiction created by the Act of 1903, only such appeal as was allowed in the Act, and the prerogative right could exist. They also refused permission to appeal from their decision on the ground that it would be a breach of their duty to pass on a case of the type contemplated in s. 74 of the Constitution unless some exceptional cause was shown.

The attempt to obtain special leave from the Privy Council to appeal from this decision in the case of *The Commissioners of Taxation, New South Wales*, v. *Baxter*[2] was declined.

The ground for the refusal to consider this case was, in the main, that an Act, No. 7 of 1907, of the Commonwealth had been passed expressly authorizing the State Parliaments to tax the salaries of Commonwealth officers, and that therefore the dispute could not reasonably arise again. It was clear that the Commonwealth Act could hardly have been valid, had the decision of the High Court been correct that it was a fundamental principle of the Constitution that such taxation should not be allowed,[3] but on the view of the Judicial Committee the Act was merely a nullity, and in any case it was clear that the question did not require decision.

But not only was the immediate cause of dispute removed by the action of the Commonwealth Parliament, but steps

[1] 4 C. L. R., at pp. 1162, 1163.

[2] [1908] A. C. 214.

[3] So per Higgins J. in *Flint* v. *Webb*, 4 C. L. R. 1178, at p. 1194. Contra, per Griffiths C.J., at p. 1187. Cf. *Parliamentary Debates*, 1907, pp. 3860 seq.

were taken to get rid of the difficulty caused by the contradictory decisions of the High Court and the Privy Council. There was passed in the session of 1907 an Act, No. 8 of 1907, to amend the *Judiciary Act* of 1903. The important clause of the Act was the second, which provided that

in any matters other than trials of indictable offences involving any question however arising as to the limits *inter se* of the constitutional powers of the Commonwealth, and those of any state or states, or as to the limits *inter se* of the constitutional power of any two or more states, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the states so far as that the Supreme Court of a state shall not have jurisdiction to entertain or determine any such matter either as a Court of First Instance or as a Court of Appeal from an inferior Court.

By s. 5 it is provided that—

when in any cause pending in the Supreme Court of a state there arises any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any state or states, or as to the limits *inter se* of the constitutional powers of any two or more states, it shall be the duty of the Court to proceed no further on the cause, and the cause shall be by virtue of this Act, and without any Order of the High Court, removed to the High Court.

The Act is made under s. 77 (2)[1] of the Constitution, which empowers the Parliament to define the extent to which the jurisdiction of any federal Court shall be exclusive of that which belongs to or is vested in the Courts of the states. It would have been impossible, in view of the decision in *Webb* v. *Outtrim*[2] to provide by a Commonwealth Act either that an appeal by special leave, or an appeal without special leave, should not lie from the decision of a Supreme Court, since by the judgement of the Privy Council that provision would be an interference with the Constitution of the state, and therefore be repugnant to the *Commonwealth of Australia Constitution Act* and to the Acts (9 Geo. IV. c. 83, s. 15, and 7 & 8 Vict. c. 69) which define the jurisdiction of

[1] It was foreseen that this could be done; see Quick and Garran, op. cit., p. 755; 4 C. L. R., at p. 1114. See *Debates*, 1907, pp. 487–500, 564–85, 3749–95.

[2] [1907] A. C. 81.

the Privy Council. The plan adopted, therefore, is to debar the Supreme Courts from ever pronouncing a *decision* on any question in which the rights of the Commonwealth and of the states, or of the states *inter se*, are at issue, and thus every such case falls to be decided by the High Court, which by refusing a certificate for an appeal could make itself the final arbiter. That the law is *intra vires* the Commonwealth Parliament appears perfectly clear, and it may be said to be not only a sensible and satisfactory solution of a difficulty, which brought both the High Court and the Privy Council into some degree of contempt, but to be in keeping with the spirit of the Constitution, which was intended to reserve to the High Court such constitutional cases.

It is, however, true that a certain amount of confusion is still possible. In the first place, the Privy Council is not compelled to require that every case shall go to a Supreme Court before an appeal can be allowed, and it is still open to the Privy Council to give special leave for appeals from any Court in a state inferior to the Supreme Court in the exercise of federal jurisdiction. The risk of this being done is, however, so small that it was deliberately passed over in the new federal Act.[1] Secondly, it is still open to the Privy Council to grant special leave of appeal even from the High Court with regard to the question whether the matter at issue is really one involving the question of the limits *inter se* of the powers of the Commonwealth and of a state or of the states. That this should be so is obviously necessary, as the High Court cannot claim by law to decide when such a question does arise, and it has been so decided in the case of the *Attorney-General for New South Wales* v. *Collector of Customs*.[2]

In 1909 Ontario proposed to limit appeals to the Supreme Court and the Privy Council alike. In the latter case all appeals of right were to disappear, and appeals by special leave to be restricted to constitutional cases, cases involving

[1] Commonwealth *Parliamentary Debates*, 1907, p. 3758.

[2] [1909] A. C. 345. (The report is misleading—the refusal was *because* the case fell under s. 74 of the Constitution Act, not *although*.) The High Court has had to decide what cases fall within this category; see p. 884.

the value of $10,000 (in place of $4,000 as at present), and cases of special importance as affecting the liberty of the subject. Mr. Foy, however, in the course of discussion, admitted that it was not possible legally to limit by provincial law appeals to the Supreme Court, and declared that a change of practice by the Privy Council rendered it unnecessary to limit appeals thither, and his Act passed without the proposed limitations. In any case the Act would have been invalid if the Judicial Committee had chosen to hear appeals by special leave, or to regulate by Order in Council under the Act of 1844 [1] the right to appeal.[2] Ontario indeed has of late had no cause to complain of the Privy Council.

§ 3. The Constitution of the Judicial Committee

The Judicial Committee of the Privy Council as now constituted [3] consists of the Lord President, the Lord High Chancellor, all Privy Councillors who hold or have held any of the offices of Lord of Appeal in Ordinary, Lord Chief Justice of England, Master of the Rolls, Lord Justice of the Court of Appeal, Judge of any of the late Courts of Queen's Bench, Common Pleas, Exchequer, Probate, or Admiralty, or of Chief Judge in Bankruptcy, all past Presidents of the Council, and Lord Chancellors, together with any two others, being Privy Councillors, whom the Crown may think fit to appoint from time to time, a provision under which Lord Haldane of Cloan and that distinguished Indian lawyer Syed Ameer Ali, now sit, and such members of His Majesty's Privy Council as for the time being hold or have held any of the offices described in the *Appellate Jurisdiction Acts*, 1876 and 1887, as High Judicial Offices. These Acts include any judge of the superior Courts in Great Britain and Ireland, and a Lord of Appeal in Ordinary.

[1] 7 & 8 Vict. c. 69, s. 1. See Ontario Act 1909, c. 52.

[2] See *Canadian Annual Review*, 1909, p. 368, and for a eulogy of the Privy Council, ibid., pp. 178, 179.

[3] See 2 & 3 Will. IV. c. 92; 3 & 4 Will. IV. c. 41, ss. 1, 30; 6 & 7 Vict, c. 38; 14 & 15 Vict. c. 83, s. 16; 20 & 21 Vict. c. 77, s. 115; 37 & 38 Vict. c. 35, sched.; 39 & 40 Vict. c. 59, ss. 6 and 14; 44 & 45 Vict. c. 3; 50 & 51 Vict. c. 70.

Any other Privy Councillors may also be summoned by the Crown.[1] An Act of 1871 empowered the Crown to appoint four paid members, who had either been Judges of a Superior Court at Westminster or Chief Justices of the High Courts in India.[2] An Act of 1895[3] makes provision for the representation of judges from the Dominions on the Privy Council. As amended in this respect by an Act of 1908,[4] provision is made that if a person who is or has been Chief Justice or Judge of the Supreme Court of the Dominion of Canada, or of a Superior Court in any of the Provinces of Canada, or in New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, New Zealand, the Cape of Good Hope, Natal, the Transvaal, the Orange River Colony,[5] or Newfoundland, is a member of the Privy Council, he shall be a member of the Judicial Committee of the Privy Council, but not more than five such members may exist at any one time. By the Act of 1908[4] provision is also made for a judge or ex-judge of a Court in the Dominion from which an appeal is being heard or of a Court to which appeal lies from that Court, sitting as an assessor to the Judicial Committee, but he acts merely as an assessor in such cases.

Under the Act of 1895 Sir Henry Strong, then Chief Justice of Canada, Sir Henry de Villiers, Chief Justice of the Cape of Good Hope, and Sir Samuel Way, Chief Justice of South Australia, were sworn members of the Privy Council on the occasion of Queen Victoria's diamond jubilee in 1897, and became automatically under the Act members of the Judicial Committee. Sir Samuel Way has not been in England since that date, and Sir Henry Strong died in 1909, but Sir H. de Villiers attended in 1897, 1900, 1901, 1905, and 1908.[6] The number of five was made up by Sir Henri Taschereau (Chief Justice of Canada from 1902 to 1906) and

[1] 3 & 4 Will. IV. c. 41, s. 5.

[2] 34 & 35 Vict. c. 91. This power was exercised, but is not a continuing power. See 50 & 51 Vict. c. 70. Under 8 Edw. VII. c. 51, s. 2, two Indian judges may sit.

[3] 58 & 59 Vict. c. 44.

[4] 8 Edw. VII. c. 51, s. 1.

[5] Presumably now the provisions will apply to the Union of South Africa.

[6] The Government of the Cape paid his expenses.

Sir Samuel Griffith, Chief Justice of the High Court of Australia, who became Privy Councillors in 1904 and 1901 respectively. Sir Samuel Griffith has never attended to hear an appeal, owing to his judicial duties in Australia. On the death of Sir H. Strong, Sir E. Barton, Chief Justice of the High Court of Australia, became a member, but he has not attended to hear an appeal. In 1911, on Sir H. Taschereau's death, Sir C. Fitzpatrick became a member.

As normally constituted the Committee contains the Lord Chancellor, four Lords of Appeal in ordinary, two persons, viz. Lord Haldane (formerly Lord James of Hereford), and Mr. Ameer Ali (formerly Sir Andrew Scoble), who are appointed under the express powers given in s. 1 of the Act of 1833; until 1911 Sir Arthur Wilson, who was appointed under the Act of 1887 as an ex-judge in the East Indies, and who drew an allowance of £800 [1] a year; and any Colonial judge under the Act of 1895 who may at intervals be able to attend.

The functions of the Judicial Committee are not confined to hearing appeals from the Colonial Courts; they hear also appeals from India, the Channel Islands, the Isle of Man, and the Consular Courts; the Judicial Committee under Acts of 1840, 1874 and 1892 hears appeals in ecclesiastical cases, and is also an Appeal Court in maritime and prize cases, from schemes framed under the *Endowed Schools Acts*, 1869 and 1873, and in miscellaneous other questions, as, for example, cases under the *Union of Benefices Act*, 1860, applications for compulsory licences under the *Copyright Act*, 1842, applications under the *Patents Acts* of 1883 and 1902,[2] appeals under the *Colonial Courts of Admiralty Act* of 1890, and appeals with regard to the appointing of legislative councillors in New Zealand,[3] New South Wales [4] and Queensland.[5] Moreover, from time to time matters are referred to the Judicial Committee under s. 4 of the Act of 1833.

[1] i. e. the double allowance of £400 a year each allowed by the Act of 1871,

[2] These matters now come in the first place before the Controller of Patents or the ordinary Courts under the *Patents Act* of 1907.

[3] *Legislative Council Act*, 1891, s. 5; *Consol. Stat.*, 1908, No. 101, s. 5.

[4] Act No. 32 of 1902, s. 20.

[5] Act 31 Vict. No. 38, s. 24.

The presence of at least three members, exclusive of the Lord President of the Council, is necessary for the hearing of any case under the Act of 1851, and no report can be made unless a majority of the members present at the hearing concur. Under an Order in Council of February 4, 1878, confirming the old Order of February 22, 1627, the Committee, differing herein from the House of Lords, embody their conclusions in a collective report, and do not publish dissenting opinions. Under the Act of 1908 a general Order in Council is made at the beginning of each reign, referring to the Judicial Committee all appeals to His Majesty in Council; formerly an annual order was made. In one or two cases questions are referred to a mixed committee containing members of the Judicial Committee and other Privy Councillors. Such cases are thus provided for in the Act of 1877 respecting the Universities of Oxford and Cambridge; and in the case of proceedings by reference under s. 4 of the Act of 1833 for the removal of a Colonial judge, Privy Councillors not members of the Judicial Committee usually sit.

In 1901,[1] at a Conference, certain suggestions were made by Mr. Justice Hodges representing Australia for the creation of a single Court of Final Appeal, to be styled His Majesty's Imperial Court of Final Appeal, in which should be vested the appellate jurisdiction of the House of Lords and of the King in Council. The Court was to be composed of the Lord Chancellor as president, the Lord Chief Justice, the Master of the Rolls, the members of the House of Lords who sit in appeal cases before the House of Lords, the members then existing of the Judicial Committee, and one person appointed[2] by the Lord Chancellor from each of India, Canada and Newfoundland, South Africa, and Aus-

[1] The proposal grew out of the discussions of 1900 as to the restriction in the Commonwealth Constitution of the right of appeal to the Privy Council. It was suggested first apparently by Mr. Haldane, and adopted by Mr. Chamberlain (*Hansard*, ser. 4, lxxxv. 271), that the objection to appeal would disappear if the Court were strengthened. See *Parl. Pap.*, Cd. 846, and cf. Quick and Garran, op. cit., pp. 243 seq.

[2] Appointments for fifteen years were recommended at suitable salaries. Others than judges were also to be eligible.

tralia, and New Zealand. It was argued by Mr. Justice Hodges that there was a danger of conflicting decisions between the House of Lords and the Judicial Committee, and that the House of Lords was preferred at the expense of the Judicial Committee in respect of its composition, while a single Court would further the unity of the Empire, and this view received support in this country. But the other delegates at the Conference of 1901 were not in favour of any substantial change.

The question of judicial appeals was discussed at the Colonial Conference of 1907. The Commonwealth then put forward a resolution, that it was desirable to establish an Imperial Court of Appeal, and Mr. Deakin dealt with it at length.[1] He then made certain complaints against the Judicial Committee. He pointed out that only four judges sat on the case of *Webb* v. *Outtrim*,[2] despite the fundamental importance of that case, and he urged that the House of Lords was preferred by Australian lawyers to the Judicial Committee. He said that the desires of Australia would be satisfied if arrangements could be made to transfer Australian appeals from the Judicial Committee of the Privy Council to the House of Lords, leaving it free for the other parts of the Empire to go to the Judicial Committee if they desired. He pointed out also the conflict between the Judicial Committee and the High Court of Australia, which had arisen with regard to the income-tax cases. He quoted with approval the recommendations of Mr. Justice Hodges in 1901, and it is possible that he meant that the Commonwealth would accept the House of Lords as a Final Court when it would not accept the Judicial Committee. Dr. Jameson, on behalf of the Cape Colony, preferred the Judicial Committee ; it is significant that the reason which he gave was the presence in that body of Sir H. de Villiers, and he assumed that if the House of Lords was the final Court, it would not be possible to provide for representation of the Colonies. Mr. Deakin pointed out to him that this

[1] See *Parl. Pap.*, Cd. 3523, pp. 200 seq.

[2] [1907] A. C. 81.

assumption was needless, and he then withdrew his objection to one Final Court of Appeal. General Botha devoted his contribution to the discussion to the question of a Final Court of Appeal in South Africa, and not to the constitution of the Court of Appeal in this country. Sir Wilfrid Laurier said that the Appeal to the Judicial Committee had as a general rule given great satisfaction, but he desired that the constitution should be remodelled, and he admitted that there was a conflict of opinion in Canada as to the value of an Imperial Court of Appeal at all. It is noteworthy that he was inclined to suggest that appeals by special leave were out of date and should be abolished. Sir Joseph Ward stated that New Zealand was in favour of an ultimate Court of Appeal—whether the Judicial Committee or an Imperial Court substituted for it. He indicated, however, that in his opinion the Judicial Committee was insufficiently informed with regard to the law of New Zealand; it was true that counsel called attention to the New Zealand side of the law, but when the argument was over the Committee might apply some rule of English law which had been revoked in New Zealand or omit to apply some rule of New Zealand law which did not exist in England, and to which at the moment their attention had not been specially called. He suggested that in the case of every appeal from the Colony a Judge of the Supreme Court should sit, not to take part in the arguments or decision, but to supply full information as to the Colonial law. The Lord Chancellor explained in reply the existing constitution of the Judicial Committee as effected by the Act of 1895. He explained the relations of the House of Lords and the Judicial Committee, and he pointed out that in the case of *Webb* v. *Outtrim*[1] the four judges who sat were men of the greatest distinction, including Lord Halsbury and Lord Macnaghten. He indicated that to transfer the appeals to the Lords would be to deprive the cases of the advantage of being heard by distinguished Colonial judges who now sat on the Judicial Committee. He also pointed out that if Australia or any other part of

[1] [1907] A. C. 81.

the Empire decided that the Privy Council should be constituted in a special manner for the hearing of appeal cases, there would be no objection to that being done. With regard to the proposal of the fusion of the House of Lords and the Privy Council, he pointed out that it had never been fully discussed in England, and that it would be premature to accept the principle.

As a result of the Conference steps were taken to pass the Act of 1908 which, in addition to amending the Act of 1895 so as to include among the judges eligible for membership of the Judicial Committee judges of the High Court of the Commonwealth of Australia, of the Transvaal and Orange River Colony, and of Newfoundland, made provision for Colonial judges sitting as assessors in accordance with the suggestion put forward by Sir Joseph Ward and accepted by the Lord Chancellor.

On the other hand, the Government of New Zealand moved at the Imperial Conference of 1911 the following resolution :—[1]

Imperial Court of Appeal. 'That now it has become evident, in consideration of the growth of population, the diversity of laws enacted, and the differing public policies affecting legal interpretation in His Majesty's Oversea Dominions, that no Imperial Court of Appeal can be satisfactory which does not include judicial representatives of these Dominions.'

The following is the text of the resolution proposed by the Government of the Commonwealth of Australia :—

Imperial Appeal Court. 'That it is desirable that the judicial functions in regard to the Dominions now exercised by the Judicial Committee of the Privy Council should be vested in an Imperial Appeal Court which should also be the final Court of Appeal for Great Britain and Ireland.'

As regards the latter proposal it is doubtful if this country is prepared to see British appeals decided by a Court on which Colonial members would sit, and unless it is so

[1] *Parl. Pap.*, Cd. 5513; see below, Part VIII, chap. iii.

prepared, action in the sense desired by the Commonwealth seems impossible.

The proposal of Sir Joseph Ward is to some extent different, and it is perhaps possible more fully to meet his position.

There are various considerations to which weight attaches with regard to the question.[1] In the first place there arises the question how far Imperial policy requires or renders desirable the retention of the right of appeal so far as the Courts of the self-governing Dominions are concerned. It is clear that little is gained with regard to securing uniformity of law, for the Dominions constantly legislate in derogation of the principles of the common law, in which alone a uniformity can be obtained, and the judgements of the Privy Council are often not acceptable to the Dominions; for instance, the decision of the Privy Council with regard to the liabilities of information agencies was not satisfactory to New South Wales, and a Bill was introduced by the Government into the Parliament which would have altered the law as declared by the judgement of the Privy Council; as a matter of fact, in passing through the Parliament, the proposed law was modified, but the action of the Government is characteristic of the manner in which from time to time the Privy Council's decisions are viewed.[2]

The Judicial Committee does, however, afford a certain security in the minds of investors in Colonial securities. Moreover, the Judicial Committee have been and are of importance in maintaining uniformity of law as to the prerogatives of the Crown, and in asserting the overriding force of Imperial Acts. But the real value of a Supreme Court of Appeal from all the Colonies is sentimental, and if on the one hand the appeal of the Privy Council has been at times a source of irritation, on the other hand there seems still to be no widespread desire or feeling in the Dominions that the appeal should be abolished. Although power exists in the Commonwealth Constitution for the Parliament to

[1] For an attack on the Privy Council, see Clark, *Australian Constitutional Law*, pp. 335–57; contra, Haldane, *Empire and Education*, pp. 128 seq.

[2] Act No. 22 of 1909; *Debates*, 1909, pp. 3137 seq.

restrict the appeals in addition to the restrictions imposed by s. 74 of the Constitution itself, no such Bill has been introduced,[1] and at the Colonial Conference of 1907 the delegates from South Africa who were desirous of a single Court of Appeal in South Africa, a desire which has now been rendered effective by the formation of the Union, still preferred that the right to grant special leave to appeal from that Court should remain intact.

That the presence of a Colonial judge or judges on the Judicial Committee would really strengthen it may be a matter for legitimate doubt, but it is probable that it would be felt in the Dominions to add weight to the decisions of the Privy Council, however little justified that feeling might be by the actual facts. There seems, therefore, to be some case for considering whether the Colonial representation on the Judicial Committee could not be made real instead of, as at present, in the main nominal. It must be assumed, of course, that if the representation were made real the Colonial judges could sit in all cases of appeals and not merely in cases of appeals from the Colonies. There would, it is assumed, be no objection to this, as if a judge were of sufficient standing to be considered a suitable person to deal with appeals from the Colonies he would be a suitable person to hear the appeals in miscellaneous matters which now lie to the Judicial Committee.

To render effective the representation of the Colonies salaries must be provided, and the first question which arises is whether Parliament could be asked to pay salaries to Colonial judges or whether the Colonies should be asked to pay these salaries. It is certain that there are no doubt strong objections to asking Parliament to pay. The Colonial appeals exist ultimately for the benefit of the Colonies, and therefore it can fairly be assumed that the Colonies would pay for the judges.

The number of judges to be added would presumably include a judge familiar with the Roman Dutch Law and

[1] The Union Parliament has a like power, and is likewise not disposed to exercise it.

a judge familiar with the English law as applied to Canada, a judge familiar with the same law as applied to Australia, a judge familiar with the same law as applied in New Zealand, and perhaps a judge familiar with French law. It would probably be impossible to assume that a judge familiar with English law would be satisfactory for Canada, Australia, and New Zealand, for the systems of law developed in these three countries, while resting on the basis of English law, have developed many important local peculiarities.

In any case the actual selection of a judge would no doubt have to rest with the Colonies, and, if the number were limited, with the self-governing Dominions in rotation. The Imperial control would be exercised through the fact that the choice of the Colonies would be restricted to Privy Councillors and the grant of the dignity of a Privy Councillor lies with the Imperial Government.

In any case it would appear to be desirable to modify the Act of 1895 as amended in 1908, so as to provide that every person who falls within the qualifications of these Acts should be automatically a member of the Judicial Committee, thus removing the restriction at present of the number to five. There seems no sound reason for restricting the number, and it seems unlikely that any possible disadvantage could result, as no Colonial Chief Justice is created a Privy Councillor unless he is of substantial merit and standing.

§ 4. Cases of Special Reference

In addition to cases which are brought to the Judicial Committee on appeal, it is provided by s. 4 of the Act 3 & 4 Will. IV. c. 41, that His Majesty may refer to the Judicial Committee any such matters whatsoever other than appeals as His Majesty shall think fit, and the Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon, as in the case of regular appeals. Such references have in the main been in the case of suspension of judges by the Governor in Council or in cases of request for removal by the Legislature. This was the case, for example, when the representatives of the Island of Grenada petitioned for

the removal of Judge Sanderson,[1] and there are other cases of this kind, including a special reference from the Bahama Islands with regard to Mr. Yelverton.[2] There have been also, however, other important matters which have been dealt with in this manner. For example, the question of the boundary between Manitoba and Ontario was thus referred to the Privy Council, and a decision given which was accepted by the two provinces, and which was afterwards embodied in an Imperial Act.[3] Again, the question of the position of the Bishop of Natal with regard to the Bishop of Cape Town was considered on a similar reference, although in that case the Judicial Committee were clear that the matter could be treated as a trial of an appeal from the Court in the Colonies.[4] In that case a question was raised as to whether an appeal was competent, inasmuch as it was asserted that the action of the Bishop of Cape Town in purporting to deprive the Bishop of Natal of his status was altogether *ultra vires*, and therefore, as a mere nullity, could not be appealed from. And again in 1886, at the request of the two Houses of the Parliament of Queensland, a reference was made to the Judicial Committee to decide the question of the rights of the two Houses respectively with regard to Money Bills, and the decision which was given has not been questioned by either House.[5] On the other hand, in 1872 a request for a decision of the relations of the two Houses in New Zealand on the same subject was referred to the Law Officers of the Crown at the request of the two Houses,[6] but it was preferred by the two Houses in Queens-

[1] 6 Moo. P. C. 38.

[2] [1893] A. C. 138. The judge resigned before judgement, but the Committee expressly negatived his protest against their power to deal with the case. Mr. Cook in 1892 and Mr. Walker in 1908 were so removed.

[3] Ontario *Sess. Pap.*, 1885, No. 8; Canada *Sess. Pap.*, 1885, No. 123 b; Imperial Act, 52 & 53 Vict. c. 28; Houston, *Constitutional Documents of Canada*, pp. 276, 277.

[4] 3 Moo. P. C. (N. S.) 115.

[5] *Parl. Pap.*, C. 4794; H. L. 214, 1894.

[6] *Constitution and Government of New Zealand*, pp. 195 seq. Again, in 1865 a question of the rights of judges in Victoria was referred to the

land that the matter should be laid before the Judicial Committee.

In 1872 it was proposed that the question of the education legislation of New Brunswick, which was alleged to infringe the terms of the *British North America Act* by limiting the rights granted to Roman Catholics under the terms of that Act, should be referred to the Privy Council for an expression of their opinion, but the Lord President of the Council pointed out that the matter was not a suitable one for such reference, and the advice of the Privy Council on a matter which might come before them later on in an appeal could not properly be given. There was also in that case no agreement by the Legislature of New Brunswick that the matter should be so considered.[1] In 1878, when the Government of Quebec asked the Secretary of State for the Colonies to refer to the Judicial Committee a legal question whether it was the right of the Governor or Governor in Council to remove a Lieutenant-Governor in a Canadian province, the Secretary of State likewise declined to accede to the request, on the broad general grounds that the matter was not one in which an agreement for reference had been made between the two Governments, and as no decision so given could be binding it would not be possible to proceed as proposed.[2]

It is also proposed to refer to the Judicial Committee of the Privy Council, in due course, the disagreements between the Governments of Canada and Newfoundland with regard to the boundary of the two Colonies in Labrador. On the other hand, in the case of the dispute as to the boundary between Victoria and South Australia it is not proposed to

Law Officers, not to the Privy Council, by the Secretary of State; hence wild indignation on the part of Mr. Higinbotham, though the Law Officers decided in his favour; see above, chap. i; Victoria *Parl. Pap.*, 1864–5, B. 34, C. 2, 1866, Sess. 2, C. 8.

[1] See *Parl. Pap.*, C. 2445, p. 121. Again, the Canadian Government declined to agree to the Secretary of State's desire to refer to the Privy Council the question of the rights of the British Columbia Government under its agreement with the Federal Government as to the Pacific railway; see Canada *Sess. Pap.*, 1885, No. 34.

[2] *Parl. Pap.*, C. 2445, p. 121. Cf. also C. 5489, pp. 13, 14.

refer directly to the Privy Council, but the question has been fought out in the High Court of Australia, and now an appeal will be brought from the decision to the Judicial Committee.[1]

In the case of the prohibitory liquor laws legislation of Canada the views of the Supreme Court were referred to the Privy Council for advice, and an opinion was reluctantly given.[2] In all such cases the Judicial Committee is unwilling to deal with hypothetical instances, even on appeal, from the Supreme Court of Canada, just as that Court is unwilling to decide cases *ex hypothesi*. None the less, the Court has decided several most important points in this manner, including the question of fishery powers ;[3] the position is curious, for the decisions of the Supreme Court in these cases are extra-judicial,[4] though an appeal is allowed. No case has yet thus been decided on appeal from a Provincial Court. It is otherwise as regards Australia ; the Commonwealth Act, No. 34 of 1910, contemplates full judicial weight being accorded to the decisions of the Court.[5]

[1] For other cases of reference cf. *in re Wallace*, 1 P. C. 283 ; *in re Pollard*, 2 P. C. 106 ; *MacDermott* v. *Judges of British Guiana*, ibid., 341 ; *in re Ramsay*, 3 P. C. 427 ; *Emerson* v. *Judges of Supreme Court of Newfoundland*, 8 Moo. P. C. 157 ; *Smith* v. *Justices of Sierra Leone*, 7 Moo. P. C. 174 (cases of relations of attorneys and justices) ; *Attorney-General of Queensland* v. *Gibbon*, 12 App. Cas. 442 (vacation of seats of Legislative Council, Queensland, above, p. 1375, n. 5) ; *Cloete* v. *Reg.*, 8 Moo. P. C. 484 (removal of recorder in Natal under Ordinance No. 14 of 1845) ; Malta marriage case, *Parl. Pap.*, Cd. 7982.

[2] Cf. Bourinot, *Constitution of Canada*, p. 105 ; [1896] A. C. 348.

[3] [1898] A. C. 700.

[4] Cf. Wheeler, *Confederation Law*, pp. 394, 395, 401, 402, 405, 406.

[5] In *Bruce* v. *Commonwealth Trade Marks Label Association*, 4 C. L. R. 1569, the High Court declined to decide the abstract question of the validity of Part VII of the *Trade Marks Act*, 1905 ; see Harrison Moore, *Commonwealth of Australia*,[2] pp. 394 seq. It may be added that the Privy Council is not bound by its own judgements of necessity, differing from the House of Lords. For cases of conflict with the Court of Appeal in England, cf. *Victoria Railway Commissioners* v. *Coultas and Wife*, 13 App. Cas. 222, with *Pugh* v. *London, Brighton, and South Coast Railway Co.*, [1896] 2 Q. B. 248 ; *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57, and cf. 3 App. Cas. 115 with 4 App. Cas. 324.

CHAPTER IV

THE PREROGATIVE OF MERCY

§ 1. The Prerogative up to 1878

The prerogative of mercy is one of the most important prerogatives of the Crown, and is an essential part of the working of the executive government of a British Dominion. It is always delegated to the Governor by some instrument; whether it would pass without delegation is a moot point, and has been noted above; it has been held by the Chief Justice of Canada [1] that the delegation is essential if it is to pass, and at any rate it is always so delegated by Imperial instruments; but on the other hand, it is so essential an element of government that it might be deemed to be included in the duties delegated to a Governor by the instruction to perform the duties of a Governor, which is the basis of all his executive authority.[2]

There is no possible doubt that the power is one which could be barred by express words in a statute; but it has never been so barred, although it has often been supplemented by rules under Acts giving prisoners releases on condition of good conduct and so forth; but these rules in no way abridge the prerogative. In some cases, as for example in the Victorian Act No. 2106 regarding indeterminate sentences, there is an express saving of the prerogative; in the Tasmanian Act 7 Edw. VII. No. 17, there is no saving, and the Bill was reserved, but allowed as being clearly in no way a limitation of the prerogative; moreover, the Tasmanian Act regarding prisons of 1906 is again significant, for it gives the power of remitting sentences thereunder to the Governor as distinguished from the Governor in Council, thus preserving, even as regards the special authority of the Act, the discretion of

[1] *Attorney-General for Canada* v. *Attorney-General of Ontario*, 23 S. C. R. 458, at p. 469. Cf. 20 O. R. 222; 19 O. A. R. 31; Wheeler, *Confederation Law*, pp. 327 seq.

[2] Cf. 20 O. R. 222, at p. 255 per Boyd C.; 19 O. A. R. 31, at p. 39, per Burton J. A.

the Governor, for the enactment is intended to do that. In most other cases of such enactments this new mode of pardon is given to the Governor in Council, and it has been expressly held that this does not subject the Governor in Council to a mandamus to grant release even if the conditions are fulfilled.[1] But that the prerogative could not be barred, as the Canadian Chief Justice was inclined to hold, is a misunderstanding and a confusion of thought; it is indeed very unlikely that the Crown would consent to the barring of the prerogative, but it could certainly be barred.[2]

In the days of Crown Colony government the power of the Governor was restricted, as a rule, by limitations on his power of remitting fines and forfeitures over £50 or £100, these being parts of the royal revenue and therefore not lightly to be dealt with. This restriction was removed entirely on responsible government, when the Government became entitled to all the revenue and when the need of reference home would have been absurd. The letters patent and instructions then in force may be illustrated by the following examples of the instruments in the Colony of New South Wales :—[3]

Clause VI of Governor's Commission, dated February 23, 1872

And We do further authorize and empower you as you shall see occasion, in Our name and on Our behalf, when any crime has been committed within Our said Colony, to grant a pardon to any accomplice, not being the actual perpetrator of such crime, who shall give such information and evidence as shall lead to the apprehension and conviction of the principal offender; and further to grant to any offender convicted of any crime in any Court, or before any Judge, Justice, or Magistrate within Our said Colony, a pardon, either

[1] *Horwitz* v. *Connor*, 6 C. L. R. 39.

[2] The Crown, of course, could still pardon, despite the delegation by letters patent, as was pointed out by the C.J. in the Canadian pardoning case, 23 S. C. R. 458, at p. 468. But if barred by Act (which has local effect) could it so pardon? The answer seems, No; the action of the Crown is as part of the Colonial Government, and is bound by a local Act, though the King lives outside the Colony. Contrast (as to appeals) Wheeler, *Confederation Law*, pp. 34 seq. with Thompson in Canada *Sess. Pap.*, 1889, No. 77, p. 5.

[3] *Parl. Pap.*, C. 1202, p. 57.

free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to you may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us.

Clause XIV of Instructions to Governor, dated February 23, 1872.

And whereas We have, by Our said Commission, authorized and empowered you, as you shall see occasion, in Our name and on Our behalf to grant to any offender convicted of any crime in any Court, or before any Judge, Justice, or Magistrate within Our said Colony, a pardon, either free or subject to lawful conditions: Now We do hereby direct and enjoin you to call upon the Judge presiding at the trial of any offender who may from time to time be condemned to suffer death by the sentence of any Court within Our said Colony, to make to you a written Report of the case of such offender, and such Report of the said Judge shall by you be taken into consideration at the first meeting thereafter which may be conveniently held of Our said Executive Council, where the said Judge may be specially summoned to attend; and you shall not pardon or reprieve any such offender as aforesaid, unless it shall appear to you expedient so to do, upon receiving the advice of Our Executive Council therein; but in all such cases you are to decide either to extend or to withhold a pardon or reprieve, according to your own deliberate judgement, whether the members of Our said Executive Council concur therein or otherwise; entering, nevertheless, on the Minutes of the said Council, a Minute of your reasons at length, in case you should decide any such question in opposition to the judgement of the majority of the members thereof.

These instruments leave, as will be seen, vague the case of all but capital cases, and great confusion naturally resulted. The practice differed very much; in most of the Australian states the matter was treated as a matter for consideration in Executive Council, and dealt with accordingly, the Governor reserving a more free hand than usual in these matters. Then in New South Wales the case was different; the ministers used never to advise at all, and the matter was disposed of without necessarily any reference to ministers whatever. On October 4, 1869,[1] the Secretary of State told

[1] *Parl. Pap.*, C. 1202, p. 1.

the Governor that the responsibility of deciding upon such applications rested with the Governor, who had undoubtedly a right to act upon his own independent judgement. But unless any Imperial interest or policy were involved, as might be the case in a matter of treason or slave-trading, or in matters in which foreigners might be concerned, the Governor would be bound to allow great weight to the recommendation of his Ministry. This was in effect repeated in a circular dispatch of November 1, 1871,[1] and in a dispatch of February 17, 1873,[2] replying to some criticisms of that circular raised by Sir Alfred Stephen, the administrator of the Government. In 1874 the matter was brought to a new issue by a minute from Sir H. Parkes in which he objected to partial control, and desired either none or complete control. The minute was forwarded to the Secretary of State by the Governor. The following are extracts from these papers :—

Minute for his Excellency the Governor

I have given much consideration to the expediency of changing the system of treatment in the cases of petitions presented for the absolute or conditional pardon of convicted offenders, and have carefully read the correspondence on the subject, commencing with Lord Belmore's dispatch of July 14, 1869, and closing with Lord Kimberley's dispatch of February 17, 1873.

The minute of Mr. Robertson, which gave rise to this correspondence, does not appear to me to deal with the real question which the dispatches of the Secretary of State present for determination in the Colony. That question, in any view, is the extent to which the minister is to have an active voice in the decision of these cases ; but in my view it is much more—it is whether the minister is virtually to decide in every case upon his own direct responsibility, subject of course to the refusal of the Crown to accept his advice, which refusal at any time should be held to be, as in all other cases, tantamount to dispensing with his services. The seventh paragraph of the minute alone touches the question of the minister's relation to the Crown, and it seems

[1] *Parl. Pap.*, C. 1202, p. 3. Cf. Parkes, *Fifty Years of Australian History*, i. 329–46.

[2] Ibid., p. 7. See also *Hansard*, ccxxiii. 1065–75.

to prescribe a position for the minister in which, on submitting petitions to the Governor, he is to express an opinion on each case, to be 'viewed as embodying no more than a recommendation', after which he is to have no further concern in the matter. I cannot subscribe to this principle of ministerial conduct, if this be what was intended by Mr. Robertson.

There can be no question, I believe, that from the beginning of the present reign the Home Secretary in England decides absolutely in all matters of this kind in the name of the Crown, and that the Crown does not in practice interfere. At no former time when the Crown took an active part in such decisions, could the Crown, in the nature of things, be subject to a superior or an instructing authority. The wide difference between the position of the minister and his relations to the Crown and to Parliament in the Colony and in England is at once apparent on reading the dispatches from the Secretary of State. The Governor is invested with the prerogative of the Crown to grant pardons, and, by the letter of the instructions conveyed to him by Lord Kimberley's circular of November 1, 1871, he 'is bound to examine personally each case in which he is called upon to exercise the power entrusted to him'. By the instructions previously conveyed to the Governor of this Colony by Lord Granville, in reply to Lord Belmore's dispatch of July 14, 1869, he is told that 'the responsibility of deciding upon such applications rests with the Governor', and, in reference obviously to advice that may be tendered, it is expressly added that the Governor 'has undoubtedly a right to act upon his own independent judgement'. And, finally, after the question has been re-opened by Sir Alfred Stephen, it is repeated by Lord Kimberley's dispatch of February 17, 1873, that 'in granting pardons' the Governor 'has strictly a right to exercise an independent judgement'.

It seems to be clear that the 'portion of the Queen's prerogative' entrusted to the Governor of a Colony, unlike the prerogative in England, is intended to be a reality in its exercise. It is undeniably the case that the representative of the Crown in a Colony, unlike the Crown itself, is subject to a superior or instructing authority. What, then, is the position of the minister, and what is intended to be the nature of the advice he may be called upon to give, and under what circumstances is that advice to be given?

In no sense of responsibility, in this respect, has the

minister in this Colony hitherto been in the same position as the Home Secretary in England. He has neither exercised the function of pardon, nor, as a rule, been asked for advice. Except in rare cases, and then only in a limited degree, when special features or new facts have presented themselves, he has never actively interfered. What would be his position, if he entered upon a system of partial advice, and accepted in matters of the gravest moment a secondary or limited authority, irreconcilable with the nature of his duties and responsibilities as a minister under parliamentary government?

Lord Granville says, 'the Governor would be bound to allow great weight to the recommendation of his Ministry.' The Circular of November 1, 1871, says, 'he will, of course, pay due regard to the advice of his ministers.' Lord Kimberley, in his dispatch of February 17, 1873, repeats the words of Lord Granville.

It cannot be doubted that the advice here intended is wholly distinct in its nature from the advice given in the general conduct of affairs. In the general case the advice is uniformly accepted, as the first condition of the adviser continuing to hold office. In all his acts the minister's responsibility to Parliament is simple, undivided, and direct. But in pardoning convicted offenders, the Governor, although he is to 'pay due regard to the advice of his ministers', is at the same time informed by the Secretary of State that he 'is bound to examine personally each case in which he is called upon to exercise the power entrusted to him', and that with him rests the responsibility. The exceptional advice implied seems to be of the nature of opinions or suggestions, to which weight may be attached as coming from persons 'responsible to the Colony for the proper administration of justice and the prevention of crime', but which in any case, or in every case, may be partially or wholly disregarded.

It does not appear to be clear that the Governor is required by the Secretary of State to seek even this secondary class of advice in all cases. It would rather seem that the instruction does not necessarily extend beyond cases in which pardons are proposed to be granted, in which cases the minister would simply have to concur in a decision already formed, or be placed in the somewhat invidious position of objecting to the extension of mercy. This view would shut out from the minister's limited power of advice the numerous cases in which much concern is frequently felt by portions

of the public, where a merciful consideration is prayed for and is refused.

I entertain grave doubts whether any change at present from the system which has hitherto prevailed will be beneficial to the Colony. In a community so small as ours, the distinctions between classes are very slight. The persons entrusted with authority and the relatives and friends of prisoners move closely together. The means of political pressure are easily accessible. A larger share by the minister in the exercise of the prerogative of pardon would not, in my judgement, be more satisfactory to the public. But if a change is to take place, and the cases of prisoners are to be decided on the advice of ministers, I can see no sufficient reason for making a distinction between this class of business and the ordinary business of Government. The minister ought to inquire into and examine each case, and each case ought to be decided on his advice. The refusal of the Governor to accept his advice in any case of this kind ought to have the same significance and effect as a similar refusal in any other case. In no other way can the minister be fairly responsible to Parliament for what is done. Either ' the responsibility of deciding upon such applications ' must still ' rest with the Governor ', as Lord Granville expresses it, or it must rest with the minister in the only way in which it would be just to hold him responsible.

(Signed) HENRY PARKES.

Colonial Secretary's Office, Sydney, May 30, 1874.

(Extract.) *Government House, Sydney, June* 29, 1874.

In a public dispatch by this mail I have forwarded to your Lordship a parliamentary paper, showing the decision which has been come to in Executive Council as to the mode of exercising the prerogative of pardon in cases which are not provided for by the royal instructions, but I think it right, at the same time, to state fully in this confidential dispatch all the circumstances which have occurred here, and which have led to the conclusion which has at length been arrived at on this subject.

When I assumed the Government of New South Wales, in June 1872, my attention was almost immediately attracted to this question by finding a number of petitions for mitigation of sentences submitted for my decision, without any opinion or advice endorsed on them by the Colonial Secretary, through whose hands they reached me. I was the more surprised at this because I was aware that such a course

was unusual, even in a Crown Colony, where the Governor is assisted in forming a judgement by the opinion expressed as to the merits of each case by the Colonial Secretary or other member of the Executive by whom such cases may be submitted for decision. Upon inquiry I was informed that it had been the practice here ever since the establishment of responsible government for the Governor to dispose of all applications for mitigation or pardon, except in capital cases, without reference to ministers. I was told that a correspondence had been going on with the Home Government for nearly three years on the subject, but that, the instructions received being thought to be conflicting, Sir A. Stephen had, a few days before my arrival, written fully to Lord Kimberley, describing precisely the practice here, and inquiring whether it was thought desirable that a different course should be adopted. Although, therefore, I entertained grave doubts myself as to the propriety of the practice, I thought it better, as it had been in force for sixteen years, and was then under reference to the Secretary of State, to make no change until a reply was received to Sir Alfred Stephen's dispatch.

When Lord Kimberley's answer reached me, in May 1873, I at once forwarded a copy of it to the Premier, for his consideration in connexion with the previous correspondence on the same subject. It appeared to me that this dispatch, read in conjunction with the circular dispatch of November 1, 1871, was clearly condemnatory of the practice which had up to that time been pursued in New South Wales. Under that system the Governor alone could be considered responsible for the exercise of the prerogative of pardon in other than capital cases, whilst it was clear that Lord Kimberley considered the responsibility for decisions, which were so intimately connected with the proper administration of justice and the prevention of crime, should rest with ministers, and not solely with the Governor, as heretofore. It seemed to me from the correspondence that the one thing which Lord Kimberley held to be indispensable was ministerial responsibility; so long as this obligation was clear and acknowledged it was a matter of little consequence by what form of consultation it was arrived at.

I took the earliest opportunity, after the receipt of Lord Kimberley's dispatch, of speaking to Mr. Parkes on the subject. I pointed out that the question so long under reference home had, at length, I thought been conclusively disposed of, and I expressed my readiness to initiate a system more in accordance with home views and constitutional

principles whenever he was prepared to take up the question. . . .

So the matter rested until about a month ago, when the attention of Parliament was attracted to the proposed release of the bush-ranging prisoners. The dispatches as regards the exercise of the prerogative of pardon were then called for, and Mr. Parkes wrote his Minute of the 30th ultimo, which will be found amongst the published papers.

Mr. Parkes' view as embodied in this paper was simply this: he preferred that the responsibility of deciding upon applications for mitigation of sentences should remain as heretofore, solely with the Governor; but if a change were insisted on, and the cases of prisoners were to be decided on the advice of ministers, as required by the Secretary of State, he could see no sufficient reason for making a distinction between this class of business and the ordinary business of Government. In effect, he declined to accept any responsibility for ministers unless they had, not only in form but in substance, a voice in such decisions.

I at once felt that it was impossible for me to accept Mr. Parkes' alternative of allowing matters to remain as they were. Such a settlement would have been opposed to the views of the Secretary of State, and it would have been instantly protested against by Parliament, as inconsistent with the principles of responsible government. The discussions which had already taken place in Parliament had shown beyond all question the necessity for some minister being responsible for the pardons granted, as well as for those which might be refused. As instancing the necessity for ministerial responsibility, in even the latter class of cases, I enclose a parliamentary paper which shows how charges of sectarian partiality and official corruption can be based on a refusal to entertain an application for mitigation. It will be obvious from a perusal of this paper how necessary it is that Her Majesty's representative should be relieved from a position which exposes him to such imputations.

I accordingly felt no hesitation in closing with Mr. Parkes' other alternative, and deciding that for the future all applications for mitigation of sentences should be submitted to me through the intervention of a responsible minister, whose opinion and advice, as regards each case, should be specified in writing on the papers. This is simply the mode in which all the ordinary business of Government is conducted, and I could see no sufficient reason for making any distinction in these cases. If the appointment of judges and other preroga-

tives of like kind had been left to the representative of the Crown, there might have been some grounds for retaining also in the same hands the exclusive exercise of the prerogative of pardon. But when everything else has been conceded to the responsible advisers, it seems too absurd to suppose that the question of letting out this or that criminal should be the one thing not entrusted to them. . . .

In the present constitutional stage it is obvious that as regards all purely local matters, ministers must be trusted 'not at all, or all in all'.

It appears to me, too, that the plan determined on meets all the requirements specified in Lord Granville's and Lord Kimberley's dispatches on this subject. The papers in every case will be laid before the Governor for his decision. He will thus have an opportunity of considering whether any Imperial interest or policy is involved, or whether his personal intervention is called for on any other grounds. If there should be no such necessity he would, of course, as desired by Lord Kimberley, 'pay due regard to the advice of his ministers who are responsible to the Colony for the proper administration of justice and the prevention of crime.'

Mr. Parkes, I think, pushes his argument against the change too far when he implies that the refusal of the Governor to accept the advice of the minister in any case of pardon would necessarily involve his resignation. Of course, theoretically, such a view is correct, but I need scarcely point out, that in the practical transaction of business ministers do not tender their resignations upon every trivial difference of opinion between themselves and the Governor. . . .

I trust that your Lordship will approve of the plan which I have adopted, with the consent of the Government, and the entire concurrence of Parliament, for dealing with applications for the mitigation of sentences in cases which are not provided for by the royal instructions. I may add, that I have learned since the matter was disposed of here, that the new system is, in effect, similar to the practice in force in the neighbouring Colonies. In New Zealand the practice, I am informed, is precisely similar to that now established in New South Wales; whilst in Queensland, South Australia, and Tasmania, recommendations for mitigations of sentences are brought before the Executive Council by a minister, which, of course, places the responsibility for the decision arrived at directly upon the Government. As regards Victoria I have not as yet received a reply to an inquiry which I have addressed to Sir George

Bowen on the subject, but I have been given to understand that the practice there is somewhat similar.[1]

The reply of the Secretary of State of October 7, 1874,[2] was in part an approval of the proposal, but it still maintained the personal position of the Governor in criminal cases, and even in minor cases, though not quite so strongly in them. There was evidently some serious discrepancy in the views of the Governor and the Secretary of State, though the latter minimizes the discrepancy in his dispatch :

I have to acknowledge the receipt of your dispatch of June 29, in which you enclose a printed paper laid before the Parliament of New South Wales, at the bottom of p. 7 of which paper is a Minute, embodying the decision arrived at by the Executive Council on the subject of the prerogative of pardon.

2. The decision of the Executive Council as contained in this Minute, being in accordance with what I believe to be the general practice in other Colonies, and also with the views of Her Majesty's Government, as expressed in my predecessor's dispatch of February 17, 1873, appears to require no comment from me, except that I understand the Minute of course not to contemplate any departure from the rules laid down in s. 14 of the royal instructions as to capital cases; and a great part of your minute immediately preceding it also expresses correctly the principles established for dealing with those other cases in which it is proposed that the prerogative of pardon should be exercised. But I doubt whether you correctly apprehend the meaning of my predecessor's dispatch when you speak of his suggesting an 'informal consultation' between the Governor and the proper minister. Lord Kimberley, as it seems to me, suggested that, except in capital cases, such consultation need not be in the Executive Council, but I entertain no doubt that he considered, as I do, that it must be of an essentially formal character, and it is very proper that the minister's advice should be given in writing. As Mr. Parkes correctly

[1] In a later dispatch of July 3, 1874, the Governor explained that the practice in Victoria was the same as in New Zealand.

[2] Ibid., p. 47. A further dispatch on p. 48 merely repeats the fact, and it is emphasized in a dispatch of May 4, 1875; C. 1248, pp. 6, 7. Consultation was in all cases essential, and the decision lay with the Governor, who was bound to consider Imperial interests as well as ministerial advice, but in all cases must decide as he thought right.

observes, the minister in a Colony cannot be looked upon as occupying the same position in regard of the Queen's prerogative of pardon as the Home Secretary in this country. The Governor, like the Home Secretary, is personally selected by the Sovereign as the depositary of this prerogative, which is not alienated from the Crown by any general delegation, but only confided as a matter of high trust to those individuals whom the Crown commissions for the purpose. Actually, therefore, as well as formally, the Governor will continue to be, as he has hitherto been in New South Wales and in other Colonies, the person ultimately responsible for the exercise of the prerogative. But this is quite consistent with the further duty expressly imposed upon him, of consulting his ministers, or minister, before he acts.

3. While, therefore, the rule of procedure now adopted is correct, it seems necessary to point out that in the last three paragraphs of your minute, you go somewhat too far in laying down that the exercise of the prerogative of pardon, even in minor cases, is a 'branch of local administration', in regard of which the responsibility formally attached to the Governor can practically be transferred to his advisers.

4. Not only is it necessary, as has already been observed, that the power given specially by the Sovereign should be exercised only by the person to whom it is given, but the duty of a Governor to the Imperial Government renders it necessary that he should himself decide whether, in any case brought before him, the exercise of the prerogative involves questions affecting the interests of persons or places beyond the Colony, or in any other respect not purely Colonial.

5. In the case of Gardiner, from which, although it is not directly referred to in your dispatch now under notice, the present question has of course arisen, a point came up for consideration, which was obviously in no sense one for the final decision of the ministers of New South Wales, or of any one Colony, however large and important. It was proposed and decided to pardon the criminal on condition of his leaving the Colony, and remaining absent from it, under the Act 11 Vict. c. 34, the provisions of which, in respect of the power of exiling criminals, have been sparingly used, and, as I have elsewhere stated, ought to be practically obsolete. The effect upon neighbouring Colonies, the Empire generally, or foreign countries, of letting loose a highly criminal or dangerous felon to reside in any part of the world except only that principally concerned to take charge of him, was a step which might clearly and not unreasonably give rise to

complaints from without the Colony ; nor could the recommendation of a Colonial Ministry in favour of such a course be of itself a sufficient justification of it.

6. I am glad to understand that the New South Wales Government is willing to take steps for repealing the fourth section of 11 Vict. c. 34.[1]

In 1877 an absurd dispute arose in Tasmania between the Government and the judges with regard to the case of a pardon granted by the Governor on the advice of ministers to Louisa Hunt.[2] The Government's action in advising this pardon was disapproved of by both Houses of Parliament, and the judges were annoyed because they thought that the Ministry and the Governor assumed to act as a Court of Appeal from the Supreme Court. The matter was referred to the Secretary of State for the Colonies, who in a dispatch of October 29, 1877, laid it down very clearly that in no manner was the exercise of the prerogative a matter of appeal from the decision of a Court. The Governor did not technically reverse a sentence nor pronounce it wrong. While not questioning either the verdict or the sentence, still he thought fit by virtue of the prerogative to extend mercy to a convict. Moreover, he disagreed with the suggestion of the Governor that in every case the judges ought to make a minute when they had passed sentence apparently for the use of the Governor in Council. That would tend to confirm the contention that the Governor and Council were a Court of Appeal from the sentence of the Court. A Governor, he added,

must keep steadily in view that the act of pardon of a sentenced criminal was an act of pure clemency, and not in any way judicial. Except in capital cases, as to which the royal instructions laid down a distinct course of procedure, the Governor, in order to inform his mind where clemency ought to be extended in any case, will do well to consult informally those who can best assist him. Amongst these he will naturally in most cases have recourse in the first instance to the judges, and particularly to the judge who tried

[1] See Act No. 17 of 1883. Victoria had a similar statute, No. 233.

[2] Tasmania *Legislative Council Papers*, 1878, No. 36 ; 1878–9, Nos. 117, 118.

the case ; and they, if they are consulted in this manner, will no doubt always be found ready to give their advice.

These instructions remained in force until 1892, when the position was changed by the issue of the new letters patent and royal instructions in that year.

The instructions in the case of Canada previous to 1878 were of the same type. Thus in September 1861 Sir Edmund Head pardoned a convict, Patterson, despite the contrary advice of ministers,[1] and in 1875 Lord Dufferin commuted the death sentence passed on Lepine for the murder of Scott in the North-West insurrection to two years' imprisonment on his personal responsibility, but after the consultation of his ministers,[2] and his conduct was fully approved by the Secretary of State.[3] In November of the same year the Australian correspondence was sent to Canada, and it resulted in the careful reconsideration of the whole matter by Mr. Blake, who in this, as in all other matters, felt strongly that the Ministry must be responsible. It may be added that in 1877 the Governor-General in Council consulted the Imperial Government in Martin's case.[4]

§ 2. The Views of Mr. Blake in 1876

The position was changed as regards Canada in 1878, as a result of the representations made in 1876 by Mr. Blake on behalf of the Canadian Government.[5]

The representations, as mentioned above, arose out of the raising of the question by the Secretary of State as to the form of permanent letters patent to be issued in respect of the office of Governor. The form which was proposed to the Government of the Dominion was that which existed in Australia, and the correspondence which had passed with

[1] Quebec *Morning Chronicle*, September 7, 1861.

[2] Canada *Gazette*, extra, January 19, 1875 ; *House of Commons Debates*, 1875, pp. 21 seq., 36 seq. ; cf. O'Donohue's case, 1877, pp. 1405 seq.

[3] *Hansard*, ccxxiii, 1075.

[4] Canada *Sess. Pap.*, 1879, No. 181 (really Colonial Office Print, N. A. No. 99).

[5] Canada *Sess. Pap.*, 1876, No. 116 ; 1877, No. 13 ; 1879, No. 181.

regard to the interpretation of the Australian instructions was well known to the Canadian Government. Mr. Blake protested strongly against the adoption of this form of instructions, and explained the principle on which his objection rested in a long minute. The Secretary of State in the main adopted his suggestions, though some further correspondence passed with regard to the desire which was pressed strongly by Mr. Blake, that nothing should appear as to the right of pardons in the letters patent.[1]

The Secretary of State was prepared to concede this request, but he decided that there must be kept in the royal instructions a clause dealing with the matter, and in that decision Mr. Blake and the Canadian Government finally acquiesced.

The following extract shows the grounds of Mr. Blake's representation :—

The main question is upon the instruction given to the Governor that he is in capital cases either to extend or to withhold a pardon or a reprieve according to his own deliberate judgement whether the members of the Council concur therein or otherwise. Having regard to the form of the commission and of this instruction the proper inference is that in all cases not capital the action of the Governor by way of pardon or commutation is to be, as is his action in other matters, under advice, and that it is only in the capital cases which are specially dealt with by the instruction that he is to act upon his own judgement even against advice. The distinction thus created does not appear well founded. It provides a different rule of action based simply on the gravity of the sentence, whereas the only tenable distinction that occurs to the sub-committee is between the cases (whether capital

[1] It may be noted that originally the Imperial Government decided that the power of pardon must be vested for all purposes in the Governor-General, overruling the proposals in s. 44 of the Quebec Resolutions, and not in the Lieutenant-Governors, and the royal letters patent originally provided for this. But when it became clear that the Lieutenant-Governors could legally pardon for offences against provincial laws (see 23 S. C. R. 458) the wording needed change to exclude such cases from the prerogative, else the Governor-General could pardon under the prerogative in such cases. But the change was only made in 1905, following the Commonwealth model, which applied to very different circumstances, for the Commonwealth has no criminal law proper. Cf. Canada *Sess. Pap.*, 1869, No. 16.

or not) which may involve Imperial interests and those which, not involving such interests, concern solely the internal administration of the affairs of the Dominion.

The sub-committee would suggest that any instruction as to independent action should be limited to such cases which are referred to in fuller language by Lord Carnarvon in his dispatch on this subject to Governor Robinson of May 4, 1875, as cases where 'matters of Imperial interest or policy, or the interests of other countries or Colonies are involved'. Lord Carnarvon instances the case of a kidnapper tried and sentenced under an Imperial Act by a Colonial Court, and that of a convict whose sentence was commuted on condition of exile from the Colony. The latter class is disposed of by the sixth clause of the proposed commission. With the former class may be ranged those of offenders who are subjects of other countries, and of political offenders. It is probable that even in the exceptional cases suggested (which of course involve as well internal as external interests) the action of the Governor would generally be in accordance with advice; and no doubt to act against advice would be to incur a very grave responsibility, though not to the Canadian people. It would also seem that in the vast majority of exceptional cases the exception would be found to be technical not real, the substantial interests involved being solely Canadian, in which event the Governor would presumably act under advice. But the sub-committee have freely recognized the possible existence in the excepted classes of Imperial interests, and this possibility furnishes, in their view, the only ground for the application to these classes of a special rule. It appears to them, however, that this special rule may be applied under the general language contained in the 8th clause of the instructions, on which they have already commented, and which if interpreted or limited in the mode they suggest would seem to them to meet every exigency.

It now becomes the duty of the sub-committee to refer briefly to the arguments upon which in the case of the Australian colonies it has been affirmed that the independent action of the Governor-General in the exercise of this power should be of a wider range than that which they suggest as proper in the case of Canada.

To the substantial argument for independent action in certain exceptional cases, the sub-committee have already alluded, and they refer to it now only in order to point out that the existence of this exception is not a reason for giving in all cases independent power, but rather the reverse.

It is the exception which proves the rule ; any arguments based upon its existence are arguments for exceptional treatment, but they are not reasons for making that treatment general, and they leave applicable to the bulk of the cases the rule which but for the exception would be of universal application. The other reasons referred to appear to be—

(I) That the high prerogative in question being personally delegated to the Governor, he cannot be in any way relieved from the duty of judging for himself in every case in which that prerogative is to be exercised, as the responsible minister of the Crown in a Colony cannot be looked upon as occupying the same position in regard to the Queen's prerogative of pardon as the Home Secretary. The sub-committee would in this connexion refer to the views of Council on the general question of ministerial powers and responsibilities as expressed in the Minute of Council and the report annexed thereto,[1] thinking it needless to restate in detail the position taken on the general subject and the argument advanced against the proposed division of powers and responsibilities.

The prerogative of pardon has been rightly vested by statute in the Sovereign, since all criminal offences are against ' her peace ' or ' her Crown and dignity ', and it is reasonable that the person injured should have the power to forgive ; but neither the punishment of these injuries nor their forgiveness (both being matters which affect the people) is arbitrary ; the one can be, and accordingly is, regulated by law ; the other, being mainly beyond the province of law, is yet, like the remaining prerogatives of the British Sovereign, held in trust for the welfare of the people, and so far as it is beyond the province of law is regulated by the general principle of the Constitution.

There may in this, as in other instances, be some difficulty in running out an exact analogy between the position in Canada and in England, but to the sub-committee it appears that the application to this subject of the fundamental rule of the Constitution, as expounded in the report referred to, affords the true solution of the question, and would furnish the nearest possible analogy between the practice proper to be pursued in each country.

In the United Kingdom, while the British Parliament makes laws for the punishment of crimes committed by their inhabitants, the Sovereign exercises her prerogative of mercy towards such criminals under the advice of her minister

[1] Above, pp. 158 seq.

there, who is chosen as other British ministers are chosen, and is responsible as other British ministers are responsible to the British Parliament for his advice. Therefore in the United Kingdom this power is exercised under the same restraints and with the same securities to the people concerned as the other powers of government.

This it seems to the sub-committee is the practical result which should be obtained in the Dominion.

Here while the Canadian Parliament makes laws for the punishment of crimes committed by the inhabitants of Canada, the Sovereign should exercise the prerogative of mercy towards such criminals under the advice of her Privy Council for Canada, or of her minister there, chosen as her other Canadian ministers are chosen, and responsible to the Canadian Parliament for his advice; nor, having regard to the reasons given in the report already referred to, can the suggested responsibility of the Governor to the Colonial Office for the exercise of this power independent of, though after advice, be deemed a satisfactory substitute for the responsibility to the Canadian people of a minister charged with the usual powers and duties in this respect.

(II) The second argument is that expediency requires that this prerogative should be independently exercised by the Governor, and it is suggested that 'the pressure political as well as social which would be brought to bear upon the ministers if the decision of such questions rested practically with them would be most embarrassing to them, while the ultimate consequences might be a serious interference with the sentences of the courts'.

This suggestion, which is supported, in the case of one of the Australian Colonies, by the views of local authorities, is not applicable in a general sense to Canada, where it has been commonly supposed that the decision of this as of other questions rests (at any rate in the cases not covered by the special instruction) practically with the ministers; where it is believed that unless in the exceptional cases pointed out by the sub-committee the embarrassments suggested would but rarely occur, and that at any rate ministers would not be relieved of any such embarrassments by the proposed course; and where it is confidently maintained that no improper interference with the sentences of the courts would result.

No doubt in the exercise of this as of many other powers of Government embarrassments and difficulties may from time to time arise; but it is believed that their true solution

will depend upon the unflinching application to every question of the constitutional principle, and that greater difficulties and troubles will arise from the avoidance than from the assumption of the full responsibility which the sub-committee suggest should, by the alteration of the existing instruction, be imposed on ministers even in capital cases.

As a result there was adopted a new form of instruction similar to that of the Commonwealth, which will be cited below. Even so in cases of equal division in the Council the Governor must decide, and he did so in Shortis's case,[1] after consulting the Secretary of State, the Council being unable to advise, and in all cases he considers carefully the recommendations of the Minister of Justice.[2]

§ 3. The Discussion at the Conference of 1887

The question of the exercise of the prerogative of pardon was considered at the Colonial Conference of 1887, when the delegates present were invited to express their opinion on a question raised by Sir F. Dillon Bell, on behalf of New Zealand, as to whether the time had not come when it was expedient to instruct the Colonial Governors that in matters relating to the prerogative of mercy they should be guided by the advice of their responsible ministers.[3] Mr. Deakin stated that he was advised by the Government of Victoria to support this contention.[4] He stated that some Governors had adopted the attitude that they were constitutionally bound to accept the advice of their ministers with reference to the reprieving or execution of a criminal, but other Governors had stood upon their rights under the instructions, and had declined to take the advice of their ministers. The position was inconvenient and difficult for the Governor, for he had been subject to public pressure, and he was unable

[1] Canada *House of Commons Debates*, 1896, Sess. 1, pp. 827–50, 7171–85; Sess. 2, p. 2279; 32 C. L. J. 237. [2] Ibid., 1908, pp. 2915 seq.

[3] See *Parl. Pap.*, C. 5091, pp. 545 seq.

[4] Cf. Higinbotham's view, Victoria *Debates*, 1875, pp. 504 seq.; Morris, *Memoir*, p. 200. In the Wantabadgery case in New South Wales in September 1885, the Governor used his discretion against ministerial advice; *Debates*, 1885–6, p. 311. But otherwise Lord Carrington in the Mount Rennie case, Parkes, ii. 177; cf. *Debates*, 1911, p. 1296.

to throw the responsibility upon ministers. Mr. Deakin stated that he would be perfectly prepared to accept the principle laid down with regard to Canada, in which the Governor-General was not expected to exercise any discretion except in the case where the pardon or reprieve might directly affect the interests of the Empire or of any country or place beyond the jurisdiction of the Government of the Dominion.

The opinions expressed, however, were on the whole unfavourable to the making of any change. Mr. Service indeed supported on behalf of Victoria the proposal to alter the instructions. He alluded to the fact that the Governor was instructed to call upon the judge who presided at the trial which ended in a death-sentence to make a written report of the case, and was authorized to cause the judge to be specially summoned. To that objection had been taken in Victoria, namely by Higinbotham C.J., who objected to being summoned except by the Executive Council.[1] Sir John Downer, on behalf of South Australia, considered that it would be very inconvenient in a small community like that to throw upon the ministers the responsibility of deciding with regard to capital sentences. Sir Robert Wisdom and Sir Patrick Jennings were of opinion that in New South Wales a change was not desirable, and Mr. Adye Douglas considered that no alteration should be made as far as Tasmania was concerned. Sir Samuel Griffith thought that the principle of treating differently the case of the prerogative of mercy and other executive actions was an anomaly, and he also criticized the instruction to the Governor then contained in the instructions, to place on record his reasons if he decided a case in opposition to the judgement of the majority of the Executive Council, on the ground that the Governor should treat the Council collectively and not as individual members. But he considered that the anomaly should be retained for the present, because the nature of the cases of life and death which occasionally arose was such that it was eminently advisable for the Colonies to have the

[1] In the Morgan case in 1884.

independent judgement of the Imperial officer—the Governor. He considered, however, that even so, ministers must be responsible for any advice which they gave and be liable to condemnation by Parliament; they could not consistently with the principles of self-government be relieved from responsibility for anything they did. The representatives of Newfoundland considered that the power in such cases should be vested in the representative of the Crown, and Mr. Service thought that the matter should certainly stand over until the Australian Colonies were agreed; while Sir William Fitzherbert, on behalf of New Zealand, thought that it was inconvenient to press the question of life and death for party decision before Parliament. No action was therefore for the time being taken upon the question at issue.

§ 4. The Change of 1892

The decision of the Colonial Conference remained for a time unchallenged, for evidently Ministries were not agreed as to the course to be taken, and some at least were not adverse to being relieved from the troublesome position involved by the necessity of dealing with such cases on their final responsibility.[1] On the other hand, Mr. Higinbotham felt very deeply on the subject, and it was one of the points on which he addressed Lord Knutsford, not as a Secretary of State, but as a distinguished person interested in Colonial affairs. His language was warm, but in effect he was right in thinking that in all ordinary matters it would be better if the usual system of responsibility was adopted. In 1888 the utterly unstable position was illustrated by the action of the Governor of Queensland, who declined to accept ministerial advice in a non-capital case; the Premier at once said he would resign, and the Governor had, after consulting the Secretary of State, to give way. Then followed a dispatch of October 30 to the officer administering the Government of the Colony, in which Lord Knutsford admitted that Sir A. Musgrave had acted strictly within his instructions, but he said that he would have done well to subordinate his

[1] Cf. Holman in New South Wales *Parliamentary Debates*, 1911, p. 1296.

personal opinion to the advice of his ministers.[1] Then came the case of the pardon of a Maori, Mahi Kai, in New Zealand, on ministerial advice, in which Lord Onslow sent a dispatch on February 7, 1891, as follows to the Colonial Office :— [2]

I have the honour to report that on October 21, 1890, sentence of death was passed upon one Mahi Kai, a Maori convicted of the murder on April 12, 1890, of one Stephen Maloney.

2. The jury in delivering the verdict accompanied it with a recommendation to mercy on account of his age (17 years), and his being of the native race.

3. I went fully into the case, and my Executive Council advised me to commute the sentence to one of penal servitude for life, and I accordingly did so.

4. The minute in the book recording the proceedings of the Executive Council is as follows : ' The Minister of Justice submits the case of Mahi Kai, an aboriginal native under sentence of death for murder at New Plymouth. Commuted to penal servitude for life.'

5. From this your Lordship will observe that there is no record of the advice given by the Executive Council, nor does any such advice appear upon the papers in connexion with the case.

6. A question has been raised as to the form in which this advice should be given in such cases—whether orally at the Council, or in writing on the papers at the time of their consideration by the Executive Council.

I enclose a memorandum from the Premier, from which your Lordship will gather that my present advisers entertain the opinion that all acts of administrative government within the Colony should, without exception, be done on the advice of ministers.[3]

They entertain the same opinion as to the advice which

[1] Queensland *Legislative Assembly Votes*, 1889, i. 601. As the action recommended was under the *Offenders' Probation Act*, 1886, the letters patent hardly, in my opinion, applied.

[2] New Zealand *Parl. Pap.*, 1891, Sess. 2, A. 1, pp. 5, 6 ; cf. pp. 19, 20.

[3] They said that the power of pardon should be regulated like all other executive powers, that is, if the Governor wished he could refuse to accept advice subject to the ordinary consequences (viz. the need of finding other advisers in case of resignation). They do not discuss or recognize the case of action in Imperial interests as they were forced to do in 1892, when they did not resign when Lord Glasgow refused to grant them an increase in the Council.

the Governor is directed to take from his Executive Council as did Lord Carnarvon in his dispatch of May 4, 1875, in which he says that 'Whether also given orally or not, it should be given in writing'.

7. So long as ministers held it to be a constitutional practice and a duty that they should retain office, even if the Governor should decline to accept their advice in the exercise of the prerogative, and so long as it was believed that collisions between the Governor and his ministers could be avoided by mutual tact and forbearance, the system may have worked well; but as soon as Sir Thomas McIlwraith resigned because the Governor of Queensland declined to accept his advice, on which occasion your Lordship did not uphold the action of Sir A. Musgrave, it became obvious that the retention of office under such circumstances ceased to be a constitutional practice with Australasian statesmen.

8. If ministers see no reason for making a distinction between the ordinary business of government and the business in connexion with the exercise of the royal prerogative of mercy, the Governor may at any moment find himself as Sir A. Musgrave did—without advisers, and unable to replace them with others having the confidence of Parliament.

9. I have found in practice that the wishes and opinions of the Governor are in other matters, as well as this, listened to with all respect, and that when consistent with their own opinions ministers endeavour loyally to co-operate with the Governor, accepting full responsibility for their actions.

But it may be that the Executive Councillors would hold very strong opinions antagonistic to those of the Governor; that the public, knowing that the Governor is instructed to call for the advice of his Executive Council, would bring very strong pressure on them to give certain advice, and to resign if it were not taken; for your Lordship is aware how strongly the public mind is sometimes agitated in cases of criminals sentenced to death.

The present practice is attended with much that is undesirable for the representative of Her Majesty. He is liable to be accused of being actuated by religious or sectarian motives, or by class prejudice. Deputations of various kinds wait upon him. The counsel for the prisoner claims to be allowed to place before him facts alleged to have come to light since the trial, and thus endeavours to turn the Governor into a Court of Appeal.

10. Parliament may, in its debates, endeavour to influence public opinion to put pressure on the Governor, for I have

noticed a growing tendency under certain circumstances to bring under criticism of the popular branch of the Legislature administrative functions performed by the Governor even under the advice of responsible ministers. How much more, then, would such a tendency develop in cases which concern the internal administration of the Colony, but where the Governor does not act with the advice of ministers, and cannot maintain that he is acting with a desire to hold the balance between parties, as in the case of the granting or refusal of a dissolution or the choice of a minister.

11. Were it not that the Governor is directed to consult his Executive Council, it might be held that the Governor alone exercised the prerogative and was alone responsible for its exercise; but, as ministers must give advice, they must also be responsible for that advice to Parliament, and may at any time demand that it be taken as effective advice.

The consequence is a responsibility differing from the general responsibility of the Governor to the Crown and the ministers to Parliament, in that it creates a double responsibility, with the possibility of deadlock.

12. In a dispatch to the Governor of New South Wales on November 1, 1871, Lord Kimberley says: 'A Governor is to pay due regard to the advice of his ministers, who are responsible to the colony for the proper administration of justice and prevention of crime;' and your Lordship, in your dispatch of October 30, 1888, to the Administrator of the Government of Queensland, adds to that doctrine that the Governor 'will allow greater weight to the opinion of his ministers in cases affecting the internal administration of the Colony than in cases in which matters of Imperial interest or policy, or the interest of other countries or Colonies, are involved'. Had your Lordships intended these instructions to apply not only to ordinary cases in which the royal prerogative of mercy is involved, but to capital cases also, the duty of the Governor would have been perfectly clear.

13. I am not prepared to follow Mr. Ballance into an inquiry whether the present is a survival of Crown Colony practice, but I am unable to say that it appears to me otherwise than as an anomaly in a community possessed of responsible government; for it seems incompatible with those principles that the Governor should be instructed to consult his ministers and yet be specifically instructed that he may, and in certain cases ought to, disregard their advice at the risk of finding himself without advisers able to carry measures and votes in Parliament.

It appears to be clear that at least two of the Australasian Governments (those of New Zealand and Queensland) entertain the opinion that, in the exercise of the prerogative of mercy, there should be distinct ministerial advice, tendered under definite ministerial responsibility.[1] It is possible that these two Colonies may not be alone in their contention; and, should your Lordship see your way to give effect to Mr. Ballance's wishes by definite instructions in that direction, I cannot see that any danger to the Empire need be feared.

The rapid strides made by these Colonies in recent years have resulted in the building up of a social fabric differing only in degree from the older communities of Europe; and circumstances have much changed since Sir H. Parkes wrote in 1874 deprecating any change in the existing practice, because, he said: 'The persons entrusted with authority, and the relatives and friends of prisoners, move closely together in a community so small as ours.' Ministers are capable of assuming complete responsibility for the administration of local affairs without exception. Public opinion expressed through a number and variety of channels is speedily exercised and quickly felt.

Any abuse of power or danger to the preservation of order, if not checked by the influence of Parliament, would be certainly arrested by the first general election, an event which can never be postponed longer than three years, but which usually recurs much more frequently.

14. In the earlier history of the Australasian Colonies, as in that of Canada, there may have been much to be said in favour of the practice, but the causes which operated to effect a change in the Dominion have not been wanting in Australasia, and should your Lordship see fit to assimilate the practice here to that which obtains in Canada, the principles of responsible government will be complete, while the Queen's representative will be freed from an anomalous position, and a difficult and undesirable duty.

As the result of Lord Onslow's suggestion, the Secretary of State addressed the several Colonies on the topic, with the result that all agreed in the adoption of the usual rules regarding executive action, under which the Governor should

[1] South Australia in the same year showed the same feeling, the Government threatening resignation. Prior to 1892 the Governor discussed capital cases in Council, asking the junior member his opinion first. Since then the Cabinet decides on its advice and the Governor approves in Council, being given of course an opportunity of seeing the papers before Council.

decline advice only in cases where either Imperial interests were concerned in the definite sense of interests affecting other parts of the Empire or foreign countries, and leave him to act in all other matters on the usual principles of ministerial advice, that is to say, reject it only if he thought he could secure another Ministry which would endorse his act and win a majority in the Lower House. As usual, there is no clear recognition of this fact in the correspondence: for instance, Lord Onslow's Premier, in commenting on the original instructions with their definite reservation to the Governor of personal discretion in capital cases, said that if that were removed the situation would be then governed by the ordinary clause of the royal instruction empowering the Governor, if he thought fit, to act in opposition to the advice of ministers :—

> In other words, the Governor may in any case refuse to accept the advice of his ministers, but in doing so he accepts a responsibility involving certain consequences. The practice, however, has been where the royal prerogative is exercised for the Governor to accept a personal responsibility, and actually to shield his ministers from either the responsibility of defending him or being under the necessity if they cannot do so of resigning.

But this is surely a false alternative ; it was not adopted by the Ministry of Mr. Ballance despite his memorandum when the next Governor in 1892[1] refused to accept his advice regarding the Upper House shortly afterwards, and it is clear that if a Governor refuses to accept ministerial advice on Imperial grounds there is no need for his ministers either to defend him or to resign. The latter alternative is ultimately, as shown elsewhere, unconstitutional; the former is an excess of magnanimity, and would only be misunderstood without benefiting either Governor or ministers.

New letters patent and instructions were issued in accordance with the wishes of the Governments in 1892 for the six Australian Colonies and for New Zealand. In 1900 they

[1] *Parl. Pap.*, H. C. 198, 1893–4, p. 19, when the Ministry actually fell back on Lord Carnarvon's view of their position as not requiring resignation. Cf. Cd. 1248, p. 7; Canada *Sess. Pap.*, 1876. No. 116, p. 82.

were reissued, with some alterations not affecting the power of pardon, in the case of the six states on the inauguration of the Commonwealth of Australia, and in 1907 for New Zealand, in consequence of the change of style of that Colony to Dominion. The documents now run as follows :—

Tasmania Letters Patent

IX. When any crime or offence has been committed within the State against the Laws of the State, or for which the offender may be tried therein, the Governor may as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one ; and further, may grant to any offender convicted in any Court of the State, or before any Judge, or other Magistrate of the State, within the State, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such periods as the Governor thinks fit ; and further, may remit any fines, penalties, or forfeitures due or accrued to Us. Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself or be removed from the State.

Royal Instructions

VIII. The Governor shall not pardon or reprieve any offender without first receiving in capital cases the advice of the Executive Council, and in other cases the advice of one, at least, of his ministers ; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of the State, the Governor shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

Since 1892 the matter of pardons has gone on without friction, and the New South Wales *Official Year Book* for 1907–8 asserts that ministerial advice is always accepted.

A case arose in Tasmania in 1908 where a considerable

difficulty was occasioned to the Ministry in dealing with an instance of the exercise of the prerogative in a capital case.[1] The Government had had no experience in dealing with the matter since the issue of the new instructions. They, therefore, while receiving a report from the judge, omitted to ask him to attend to discuss the matter in Cabinet or to make any recommendation. It is usual in the other states for the Government to ask the Chief Justice to attend and to question him on legal points, though Chief Justices, as a rule, do not make recommendations.[2] The Executive Council decided to recommend that the law should take its course, but the counsel for the accused elicited the fact that the judge was in favour of the commutation of the sentence, and in consequence a popular agitation was started which resulted in the judge being asked to attend a further Cabinet meeting, and in the Cabinet deciding to commute the sentence in accordance with his advice. Nevertheless, they were faced by an attack in the House of Assembly, which, however, was withdrawn when it appeared that the Government had acted with no intention of disregarding their duty and their position.[3] The case was important because the Governor thought it well to address a minute to ministers explaining that under the new instructions no personal responsibility rested in such a case with the Governor, that the mode of procedure had been left by the new instructions for the discretion of each Colonial Government, and that in New Zealand the presence of a judge was not considered by Mr. Ballance in 1892 to be necessary in the discussion of sentences, as the Executive Government there carried out the law.[4]

[1] See Hobart *Mercury*, October 20–2, 1908.

[2] The practice, I believe, varies; the above statement represents the rule followed by the late Sir F. Darley, C.J. of New South Wales.

[3] Dr. McCall appears to have raised the matter to make clear that a man's fate must not be allowed to be decided without securing all available information.

[4] In Canada in a capital case, since 1866 each judge is under a legal obligation to furnish a full report. For New Zealand see *Parl. Pap.*, 1893, A. 1, p. 12; *Constitution and Government of New Zealand*, pp. 187, 210.

In 1909 in Western Australia the condemnation of a murderess raised much excitement; the question was raised in Parliament by the Opposition, and, on the refusal of the Government to reprieve, a deputation waited on the Governor, who, after receiving the advice of ministers, declined on their advice to exercise the prerogative. The occasion was taken for making clear the responsibility of ministers for the action taken.[1] In New South Wales the advent of the Labour Government to office in 1910 was followed by very vehement discussions of the exercise by them of the prerogative of mercy in the case of a murderer, and in cases of strike leaders,[2] with the result that in the Criminal Appeal Bill of 1911 an attempt, severely censured by the Opposition, was made to refer death sentences for recommendation to a council of judges, whose view would have practically been final.

It may be added that it has been held in Victoria[3] that a free pardon does not remove the criminal stain, or exempt a criminal so pardoned from punishment under an Act to prevent the influx of criminals.

In the case of the Commonwealth of Australia on its formation the Canadian model was formed: that is, the letters patent ignore the subject *in toto*, and it is relegated to the instructions, where the whole of the old clause of the letters patent and that of the instructions is run into one; that does not matter, for the royal instructions and the letters patent are only two different modes of signifying the royal pleasure in prerogative matters, and except by statute or usage there is no ground to ascribe more sanctity to one than to the other; indeed the exercise of the prerogative could clearly be delegated by dispatch just as its exercise is in particular cases regulated by dispatch. The terms of the new instruction run as follows:—

[1] For South Australia, see *Legislative Council Debates*, 1910, p. 450. For Western Australia see *West Australian*, October 6, 1909; *Debates*, pp. 806–29.

[2] See *Parliamentary Debates*, 1910, Sess. 2, pp. 41, 704; 1911, pp. 1295 seq., 1316 seq.; Sydney *Bulletin*, August 10, 1911.

[3] *Ryall* v. *Kenealy*, 6 W. W. & A'B. (L.) 193, at pp. 206, 207.

VIII. And We do further authorize and empower Our said Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of Our Commonwealth has been committed for which the offender may be tried within Our said Commonwealth, to grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one ; and further, to grant to any offender convicted of any such crime or offence in any Court, or before any judge, justice, or magistrate, within Our said Commonwealth, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our said Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. Provided always, that Our said Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from Our said Commonwealth. And We do hereby direct and enjoin that Our said Governor-General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of the Executive Council for Our said Commonwealth, and in other cases the advice of one, at least, of his Ministers ; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of Our said Commonwealth, Our said Governor-General shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

It will be seen that the only pardoning power vested in the Governor-General is that of pardoning offences tried against the laws of the Commonwealth ; the case is now the same in Canada, where the power to pardon is to pardon offences against the laws of the Dominion and does not extend to crimes which are punishable by the Courts of the Dominion as being committed under the jurisdiction of the Admiralty or otherwise by Imperial enactment triable therein, or as in the case of piracy triable therein *jure gentium*. There is, however, a considerable difference between the cases : in

Canada criminal law is a matter for the federal parliament, while in the Commonwealth it is a provincial matter, each state retaining unfettered power to deal with offences against its criminal law. Moreover, the Commonwealth Courts in their federal jurisdiction are not intended for criminal cases of the kind authorized to be tried in any part of the Empire by the Courts of the place where the criminal is apprehended or in custody, and therefore the power of the Commonwealth extends mainly to pardoning offences against the quarantine, defence, customs and excise, and the postal laws of the Commonwealth ; in such cases there might be a double power of pardon, viz. the offender might, e. g. by forgery, be guilty of a common law or statutory offence and also of a crime against the postal regulations ; in such a case there would be power to exercise the prerogative according as he was indicted under the ordinary criminal law of the state or under the *Post and Telegraph Act* of the Commonwealth. It is true, however, that the words of the state letters patent are so wide that technically they would seem to cover the pardon of an offender by a State Governor on the advice of his state ministers for an offence against a Commonwealth law ; it is needless to say that such a proceeding would be utterly unconstitutional, and may be deemed as beyond the range of possibility ; if it did, the matter could be decided by a Court on proceedings taken either to secure the discharge of the prisoner from custody or his restoration to bondage.[1]

§ 5. The South African Colonies and the Union

South Africa stands quite apart from the other Colonies regarding the exercise of this prerogative. The form adopted in the case of the Cape in 1872 and again in the

[1] That in Canada the Governor-General could pardon offences against provincial laws under the terms of his former instructions even in 1878, is quite clear, was deliberately intended by the Imperial Government, and is asserted in Canada *Sess. Pap.*, 1869, No. 16. Before federation matters were different in regard to Upper Canada, where both the Governor-General and the Lieutenant-Governor had a delegation ; see Upper Canada *Legislative Assembly Journals*, 1839, II. ii. 625.

permanent letters patent of 1879, and in the case of Natal in 1893, and in the case of the Transvaal and the Orange River Colony in 1906 and 1907, are the same in essentials and may be illustrated by the Natal instruments :—

Royal Instructions

IX. Whenever any offender shall have been condemned to suffer death by the sentence of any Court, the Governor shall consult the Executive Council upon the case of such offender, submitting to the Council any report that may have been made by the judge who tried the case ; and, whenever it appears advisable to do so, taking measures to invite the attendance of such judge at the Council. The Governor shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do, upon receiving the advice of the Executive Council thereon ; but in all such cases he is to decide either to extend or to withhold a pardon or reprieve, according to his own deliberate judgement, whether the members of the Executive Council concur therein or otherwise ; entering nevertheless, on the minutes of the Executive Council, a minute of his reasons at length in case he should decide any such question in opposition to the judgment of the majority of the members thereof.

Letters Patent

IX. When any crime has been committed within the Colony, or for which the offender may be tried therein, the Governor may, as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders, if more than one ; and further, may grant to any offender convicted in any Court, or before any judge, or other magistrate within the Colony, a pardon either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such period as the Governor thinks fit ; and further may remit any fines, penalties, or forfeitures due or accrued to Us. Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself or be removed from the Colony.

One difference, however, is to be noted : after the passing of the *Aliens Act* by the Imperial Parliament the Government of the Cape asked that it might be allowed to banish from its shores certain classes of offenders, as the Cape was the happy hunting-ground of adventurers from every part of the world, and it was advantageous to be able to get rid of them, and one way would be by granting conditional pardons. It was felt by the Imperial Government that in view of its own new policy the old prohibitions against exiling persons would not be possible to be maintained in their integrity, and accordingly the letters patent of the Cape and subsequently of the Transvaal and the Orange River Colony, but not of Natal, which made no request for change, were modified so as to read in the proviso as to establishment the words ' if the offender be a natural-born British subject, or a British subject by naturalization in any part of our Dominions ', thus allowing the banishment of aliens, and such banishment has gone on cheerfully ever since with increasing inconvenience to the Imperial Government, as the route home for these banishees from the continent is via England, where they are tempted to sojourn for a season.

The reason for vesting this personal discretion in the Governor in South Africa is due of course to high considerations of native policy, which would be of paramount importance in the case of a murder trial, whether of a native for murdering a white, or a white for murdering a native. There may well be cases in which either the pardon or the execution of a native or of a white man would be equally fatal to the peace of South Africa, and as an Imperial interest it is well to secure impartiality by the entrusting of the power to the Governor-General. Hence in the case of the Union the instructions, which as in the case of Canada and the Commonwealth embody the matter in other cases put in the letters patent, run as follows :—

IX. And We do further authorize and empower the Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of the Union has been committed for which the offender may

be tried within the Union, to grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, to grant to any offender convicted of any such crime or offence in any Court, or before any judge, justice, or magistrate, within the Union, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence, for such period as to the Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. Provided always, that if the offender be a natural-born British subject or a British subject by naturalization in any part of our Dominions, the Governor-General shall in no case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from the Union.

And we do hereby direct and enjoin that the Governor-General shall not pardon, grant remission to, or reprieve any such offender without first receiving in cases other than capital cases the advice of one, at least, of his ministers.

Whenever any offender shall have been condemned to suffer death by the sentence of any Court, the Governor-General shall consult the Executive Council upon the case of such offender, submitting to the Council any report that may have been made by the judge who tried the case, and, whenever it appears advisable to do so, taking measures to invite the attendance of such judge at the Council. The Governor-General shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do, upon receiving the advice of the Executive Council thereon; but in all such cases he is to decide either to extend or to withhold a pardon or reprieve, according to his own deliberate judgement, whether the members of the Executive Council concur therein or otherwise; entering nevertheless, on the Minutes of the Executive Council, a minute of his reasons at length in case he should decide any such question in opposition to the judgement of the majority of the members thereof.

The omission of any reference to Imperial interests in the exercise of the prerogative in ordinary cases is a somewhat

curious one. It may be argued hence that the power of the Governor-General is to be exercised entirely on the advice of ministers except where he is prepared to find new ones if they resign; but the case is historically, and no doubt in intention, otherwise; this form dates from the old forms which were simplified in the case of Australia. The old forms, as authoritatively interpreted by various Secretaries of State, imposed not only in capital but in all cases[1] a personal responsibility on the Governor, and though the new form will hardly at the present time carry with it that onus, it will be subject to the implied rule that Imperial interests justify and require deviation from the practice of accepting ministerial advice. It is in harmony with this that the Union instructions contain no power of action in disregard of ministerial advice on other matters of executive action of Imperial interest, for this power was recognized by Mr. Blake to apply *ipso facto* to all cases where Imperial interests overrode Canadian.

In Newfoundland the old form of instruments is retained, and now is similar to those issued in the case of the Cape. But in this case no alteration has ever been asked for or made to permit of the banishment of aliens. As a matter of fact, the practice of the Governor dealing with all cases personally continued right up to the governorship of Sir William Macgregor, who induced ministers to accept a change of system and to follow the usual rules of Colonial procedure in this matter. The disadvantages of the system as it stood were seen when the Governor remitted an absurd fine imposed for a technical breach of the game laws of the Colony, and the incident was seized as an opportunity for a personal attack on the Governor by the press of the Colony.[2]

§ 6. Amnesty, &c.

A few minor points as to the prerogative may be noted. It is still the case that no Governor is given formal authority

[1] See Lord Carnarvon's view (above, p. 1397), Lord Knutsford (p. 1406); *contra* Blake (p. 1400). Cf. Cape *House of Assembly Debates*, 1907, pp. 100–2.

[2] *Evening Telegram*, January 20, 1908.

to grant an amnesty; this, however, is of no conceivable consequence, since the power can be exercised in the way of an undertaking that persons will not be prosecuted when the same effect results as if an amnesty had been offered.[1] Since 1878, acting on a suggestion of Mr. Blake's, specific power has been given to issue pardons for offences triable in a Colony though not there committed.[2] It has been held since 1893 that a Governor can pardon for a contempt committed despite the objection of the judge,[3] an important decision, for the power of the Crown to pardon contempts in the case of committals by the Irish Land Courts has been doubted, apparently without adequate ground.[4] The Governor can, but in practice does not pardon offences committed within Colonial limits by members of the Imperial forces,[5] whether naval or military, but he is clearly empowered to do so. Since 1871 specific provision has been made for the pardon of accomplices.[6]

The right of remitting fines due to an informer is settled for the United Kingdom by an Act of 1859,[7] but this Act does not apply to the Colonies, and when the power to remit a penalty, part of which was due to an informer, was used

[1] Thus in 1865 the Governor of New Zealand issued a proclamation promising that certain persons should not be prosecuted; so in 1871, and in 1875 Lord Dufferin issued an amnesty for the rising of 1870 for all save Riel and Lepine (in whose case five years' banishment was prescribed as a condition), and O'Donohue was omitted, but was pardoned on a like condition on November 22, 1877; see Canada *Gazette*, April 24, 1875; *Sess. Pap.*, 1878, No. 55. See also Forsyth, *Cases and Opinions on Constitutional Law*, p. 113; *Parl. Pap.*, C. 1202, p. 4. Of course an amnesty may be given by a local Act, as in New Zealand in 1882, Act No. 4 (Rusden, iii. 470), in Canada, 10 Vict. c. 116; 12 Vict. c. 13.

[2] Cf. Canada *Sess. Pap.*, 1876, No. 116; 1879, No. 181. The power would seem to have been included in the wide terms of the older commission and was exercised under them. It is omitted in the latest Canadian form (1905) and in the Union form (1910) in error.

[3] [1893] A. C. 138.

[4] *Hansard*, 1908, cxciii. 102.

[5] Cf. his statutory duties under the *Army Act*, 1881, s. 54.

[6] See *Parl. Pap.*, C. 1202, p. 4; New South Wales Letters Patent, February 23, 1872, s. 6; New Zealand *Parl. Pap.*, 1872, A. 1 a, pp. 10-2.

[7] 22 Vict. c. 32.

in 1908, there was some discussion in the Newfoundland press which led in 1910 to the passing of an Act (c. 17) removing all doubt as to the power of the Governor so to proceed, and the matter is usually so decided by local legislation. But in such cases the Governor does not act under the prerogative, but under the statute. This, however, would in no case alter the principles on which his action would be based.

PART VII. THE CHURCH IN THE DOMINIONS

CHAPTER I

§ 1. The Legal Position of the Church

The position of the Church in the Colonies presents a remarkable contrast to the position of the Church in the United Kingdom. It is true that at the present day the gradual disuse or formal repeal of the powers of ecclesiastical jurisdiction, other than those referring to ecclesiastical members of the Church itself, has considerably diminished the importance of the official recognition by the State of the Church as an essential part of the State. But the connexion has only been diminished ; it remains in full force in many particulars, and the presence of the bishops in the House of Lords is a significant sign of the connexion of Church and State. Moreover, the Crown not only has the full control over the appointment of the archbishops and bishops, besides possessing an extensive ecclesiastical patronage, but the ecclesiastical Courts exercise complete jurisdiction on the terms laid down by Parliament over members of the Church itself.

In the Dominions at the present day, except in the case of the Province of Quebec,[1] it cannot be said that there is any organic connexion between the Church and the State.

[1] In a sense the State has little control over the Church in Quebec, which is subject to an external power, the Pope, who issues laws binding Catholics—cf. his marriage laws in the *Canadian Annual Review*, 1908, p. 629, and Gladstone, *Vatican Decrees*, p. 43. But the Church can compel by law the payment of dues by Roman Catholics, and thus obtains great privilege from, while independent of, the State. The Law Officers once advised that the Crown could appoint Roman Catholic bishops in Canada by the prerogative, but it was not done ; see Forsyth, *Cases and Opinions on Constitutional Law*, pp. 49–51.

The history of the question is of interest. The ecclesiastical law of England is not part of the common law which was introduced by British settlers into settled Colonies. The letters patent creating Colonial bishops have not purported to confer upon such bishops jurisdiction over lay persons such as used regularly to be exercised by the ecclesiastical Courts as, for example, in matrimonial matters, questions of probate, ecclesiastical dues, or cases of brawling, defamation of character, and so on. The first Colonial bishopric created was that of Nova Scotia in 1787, where the letters patent conferred upon the bishop full power and authority upon ecclesiastical matters over the ecclesiastics of the Church of England in Nova Scotia, and authorized him not only to visit the various ecclesiastical persons in his diocese, but also to punish and correct them, whether by removal, deprivation, suspension, or other ecclesiastical censure or correction, according to the ecclesiastical law of England, and to inquire into their conduct by witnesses to be duly sworn. Another commission empowered the bishop to exercise like authority and jurisdiction in Quebec, New Brunswick, and Newfoundland. Reference is made to this bishopric in s. 40 of the Act of 1791, establishing representative institutions in the two Canadas. In 1793 the bishopric of Quebec was founded, and the two Canadas were removed from the jurisdiction of Nova Scotia. In 1819 an Imperial Act (c. 60) recognized the episcopal jurisdiction of the Bishops of Quebec and Nova Scotia as existing.[1] In 1839 the diocese of Newfoundland was detached from the diocese of Nova Scotia and the diocese of Toronto carved out of that of Quebec, the same power of jurisdiction being given. In 1845 the bishopric of New Brunswick was detached from that of Nova Scotia, New Brunswick having possessed representative institutions from 1784. In 1857 the bishopric of Huron

[1] The Governor in the Canadian Provinces had power under his commission and instructions to appoint to benefices, but he was required to allow the bishop to institute (cf. 2 P. C. 258, at pp. 267 seq.); it was preserved in the letters patent of Lord Monk in 1861, and repeated for all Canada in 1867 as Governor-General. Hence it was argued that the right of presentation belonged to the Governor-General in New Brunswick in 1869, but local legislation settled the doubts, just as in the case of the issue of marriage licences.

was carved out of that of Toronto, and in 1862 the bishopric of Ontario was carved out of that of Huron, while a Bishop of Rupert's Land was appointed in 1849, in each case with powers of jurisdiction.[1]

In 1856 an Act (c. 141) of the United Provinces of Canada authorized the bishops, clergy, and laity of the Church of England in the Canadas to meet in their several dioceses and to frame constitutions and make regulations for enforcing discipline in the Church for the appointment, dispossession, and deprivation or removal of any person bearing office therein, and for other matters, and to meet in synod to frame a constitution and regulations for the general management and good government of the Church. This Act was assented to and was subsequently explained and amended by a later Act of 1859, c. 139. Consequent on the passing of these Acts, at the request of the Canadian Church, a metropolitan was appointed by letters patent of 1860 and 1862, which gave him not only the power of presiding at their provincial councils, as desired by the Canadian Church, but large powers of suspending on certain occasions the local jurisdiction of the bishops, and exercising specific jurisdiction of his own in their dioceses. Complaints were made against his exercising this jurisdiction, and he was informed that it was illegal, and that his powers were subject to the Acts.

In the case of New Zealand, originally included in the diocese of Australia, in 1841 a bishopric was created by letters patent with the usual jurisdiction. In 1856 and in 1858 four new bishoprics were carved out of the old one, but with powers of visitation only, the Bishop of New Zealand being given metropolitan jurisdiction. In Australia the see of Australia was constituted in 1836. In 1842 the bishopric of Tasmania was created with usual powers of jurisdiction,[2] but as complaints had been made by Baptist ministers and Presbyterians, especially with regard to the

[1] In the case of these appointments the grant of jurisdiction was clearly inadvertent. Power to visit only was given in the case of Montreal (1850) and British Columbia (1859), and in the new patent (1858) of Nova Scotia; see *Parl. Pap.*, H. C. 476, 1866. Cf. also H. C. 276, 1855; 131, 1856.

[2] Cf. also the Law Officers' opinion in Forsyth, op. cit., p. 52.

part of the letters patent which gave the bishop the power of summoning witnesses and examining them on oath, on the advice of the Law Officers new letters patent were issued in 1849 omitting the power to summon witnesses, the power to examine on oath, the express mention of jurisdiction, and the express power to punish by suspension, deprivation, or otherwise, and only authorizing the bishop to visit the clergy, to call them before him, and to inquire as to their morals and behaviour in their office and stations.

This question being settled thus, the bishopric of Australia was divided in 1847 into four bishoprics, Sydney, Newcastle, Melbourne, and Adelaide, metropolitan powers over these dioceses as well as Tasmania being given to the Bishop of Sydney, and in all these dioceses the ecclesiastical powers were reduced to those of visitation. The diocese of Adelaide covered South and Western Australia. In 1856 a bishopric was created at Perth, in 1859 one at Brisbane which coincided with the newly separated Colony of Queensland, and in 1863 one at Goulburn, in all these cases powers of visitation only being given.[1]

In New South Wales an Act, 8 Will. IV. No. 5, ss. 19, 20, invested the bishop with the power of licensing clergy and withdrawing their licences upon cause being shown, and this Act clearly was in force in Queensland, since it was passed before the separation of the Colonies. The Legislature of Victoria, by an Act of 1854 (No. 19), enabled the bishops, clergy, and laity of any Victorian diocese to meet in synod and make regulations for the enforcement of discipline. In Tasmania similar provisions were made by a local Act of 1859, 22 Vict. No. 20, which enabled the bishop to examine

[1] After the recognition of the new state of affairs, more bishoprics were created in New South Wales, Queensland, Victoria, and Western Australia, but there is only one bishopric both in Tasmania and South Australia, while the Northern Territory was part from 1900 of the diocese of Carpentaria. In 1866 New South Wales adopted a constitution (see 7 C. L. R. 393), and 1868 and 1872 saw the example followed by Queensland and Western Australia. In 1872 a general synod of dioceses in Australia was agreed on, and remodelled in 1896. Since 1905 there have been three archbishops, the primate being elected by the bishops; see *Year Book of Australia* (1908), pp. 442 seq.

witnesses on oath, though not to summon them. In South Australia no legislation was passed, but the bishops and clergy bound themselves in 1855 by what was called a 'consensual compact', establishing a synod and binding the clergy to obey its regulations.

In the case of South Africa a bishopric of Cape Town was established in 1847 with power of visitation only, the Cape being then a Crown Colony and the Tasmanian question of jurisdiction having been determined. In 1850 to 1853 a representative Parliament was instituted in the Cape. Then letters patent were issued in 1853 after the constitution of the Parliament reconstructing the bishopric, while a bishopric of Natal was created and the bishopric of Graham's Town was carved out of Cape Town, with powers of visitation.

This was the state of affairs prevailing when three most important cases were decided which finally determined the position of the ecclesiastical law in the Colonies. In the case of *Long* v. *The Bishop of Cape Town*,[1] decided by the Privy Council, Mr. Long, the appellant, who was an incumbent of a parish in the Colony of the Cape of Good Hope, refused to obey certain orders given by the bishop of the diocese in the exercise of his episcopal authority, and for such disobedience he was first suspended and then deprived. It was held by the Judicial Committee that, after the grant of a constitutional government in the Cape, the letters patent were invalid for the purpose of conferring either ecclesiastical or civil jurisdiction. They then considered whether there could be set up a contract between Mr. Long and the bishop. They held that Mr. Long, by taking the oath of obedience to the bishop, and by accepting a licence to officiate, and the appointment to the living, under a deed which contemplated the removal of the incumbent for any lawful cause, did voluntarily submit himself to the authority of the bishop to such an extent as to enable the bishop to deprive him of his benefice, this being decided on the basis of contract. But they decided that Mr. Long had not been guilty of any such

[1] 1 Moo. P. C. (N. S.) 411. Cf. *ex parte King*, 2 Legge, 1307; Blachford, *Legal Development of the Colonial Episcopate*; Adderley, *Colonial Policy*, pp. 395–404; Forsyth, *Cases and Opinions in Constitutional Law*, chap. ii.

offence as justified the sentence against him. The bishop had convened a synod, and Mr. Long was required to procure the election of a delegate for the parish. The Judicial Committee held that the bishop had no power to convene a synod without the sanction of the Crown or the Colonial Legislature, and therefore Mr. Long was justified in refusing to help to call the body into existence. The oath of obedience only referred to lawful commands. In giving judgement the Court said: 'The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly or by implication have assented to them.' The Court also held that even if Mr. Long had an appeal under the letters patent to the archbishop, which they did not decide, as the matter in respect of which the appeal was brought had to do with a temporal right, he was at liberty to resort to the Supreme Court of the Colony.

This case was followed by the case *in re The Lord Bishop of Natal*,[1] in which Dr. Colenso presented a petition to Her Majesty in Council alleging the nullity of a sentence of dispossession for heresy pronounced against him by the Bishop of Cape Town as metropolitan of that diocese.

In that case it was held by the Judicial Committee that the Letters Patent of 1853, which purported to subject the Bishop of Natal in ecclesiastical matters to the jurisdiction of the Bishop of Cape Town were *ultra vires* and of no effect whatever. Their decision was based on the fact that except in the case of a Colony in which the Crown had power to legislate, whether by the prerogative to legislate for a conquered or ceded Colony, or whether it had power to legislate under such an Act as that of 1843[2] regarding the West African settlements and the Falkland Islands, the King could not set up by letters patent a metropolitan see or province, or create an ecclesiastical corporation, whose status rights

[1] 3 Moo. P. C. (N. S.) 115. Cf. *Bishop of Capetown* v. *Bishop of Natal*, 3 P. C. 1.

[2] See now *British Settlements Act*, 1887.

and authority the Colony could be required to recognize, after the Colony or settlement had received legislative institutions. The Judicial Committee considered that this view was borne out by the course of legislation. Thus the bishopric of Calcutta was established under the authority of an Act of 1813; the additional bishoprics of Madras and Bombay were also established under an Act of 1833, both of which Acts conferred an ecclesiastical jurisdiction as far as necessary for administering holy ceremonies and for the superintendence and good government of the ministers of the Church establishment. In 1824 a bishop was appointed in Jamaica by letters patent, but his position was confirmed by a Colonial Act, which would have been improper unless the Law Officers of the Government had been satisfied that the Colonial statute was necessary to give effect to the establishment of the bishopric. Moreover, in England even under Henry VIII it was considered necessary to pass an Act to establish new bishoprics, and the same plan had been adopted in the case of the bishoprics of Manchester and Ripon. No doubt letters patent had long been issued conferring an ecclesiastical jurisdiction, but such letters patent were no doubt inadvertent copies of the instruments issued for India under the provisions of an Act of Parliament.[1]

They also laid it down that the ecclesiastical law of England was not in force in a settled Colony,[2] and that therefore ecclesiastical jurisdiction could not be conferred even if the letters patent were sufficient in law to confer on Dr. Gray the ecclesiastical status of metropolitan, and to create between him and the Bishop of Natal the personal relations of

[1] Historically this argument is certainly incorrect.

[2] Save, of course, by legislation as in Prince Edward Island in 1802 (43 Geo. III. c. 6), with a saving for dissenters. This Act stood until 1879, when it was repealed (c. 18), an attempt in 1878 having proved abortive by delay in assent; *Provincial Legislation*, 1867–95, pp. 1200–2. In New Brunswick the Church was not established, though favoured; see Hannay, *New Brunswick*, i. 169 seq. In Nova Scotia the Church was by Act of 1758 established, and its position was one of great strength; the bishop was a member of the Council; it is no longer in this position; see *Rev. Stat.*, 1900, c. 109; Act 1911, c. 117. In the rest of Canada it was never established.

metropolitan and suffragan. They also held that so much of the letters patent as attempted to confer any coercive legal jurisdiction was in violation of the law 16 Car. I. c. 11, which had repealed the power given in s. 18 of 1 Eliz. c. 1, to appoint persons to exercise ecclesiastical jurisdiction within the realms of England and Ireland, or any other the dominions and countries of the Crown. By 13 Car. II. c. 12 the ordinary ecclesiastical jurisdiction and authority as it existed before 1639 was restored, but the Act of 16 Car. I was repealed only with a proviso that s. 18 of the Act of Elizabeth should remain repealed.

There was therefore no power in the Crown to create any new or additional ecclesiastical tribunal or jurisdiction, and the clauses which purported to do so contained in the letters patent to the appellant and respondent were simply void in law. No metropolitan or bishop in any Colony having legislative institutions could, by virtue of the Crown's letters patent alone (unless granted under an Act of Parliament or confirmed by a Colonial statute), exercise any coercive jurisdiction, or hold any court or tribunal for that purpose.

Pastoral or spiritual authority might be incidental to the office of bishop, but all jurisdiction in the Church, where it could be lawfully conferred, must proceed from the Crown, and be exercised as the law directed, and suspension or privation of office was matter of coercive legal jurisdiction and not of mere spiritual authority.

They proceeded to consider the question whether there was any contractual basis, and they replied that not only was there no trace of an agreement to confer jurisdiction, but it was not legally competent to the Bishop of Natal to give, or to the Bishop of Cape Town to accept or exercise, any such jurisdiction. They also pointed out that the reference to them was perfectly proper, as it was a reference to the Sovereign as head of the Established Church and depositary of the ultimate appellate jurisdiction. Before the Reformation, in a dispute of this nature between two independent prelates, an appeal would have lain to the Pope, but all appellate authority of the Pope over members of the Established Church was by statute vested in the Crown. Moreover, by the Act 25

Henry VIII. c. 19, regulating appeals to the Crown in ecclesiastical causes, it was enacted that for lack of justice in any of the King's dominions it should be lawful to the parties grieved to appeal to the King's Majesty in the Court of Chancery, an enactment which gave rise to the Commission of Delegates for which the Judicial Committee was substituted by an Act of 1832. Moreover, in any case, by the Act 3 & 4 Will. IV. c. 41, Her Majesty had power to refer to the Judicial Committee for hearing or consideration any matter whatsoever as Her Majesty should think fit, and on June 10, 1864, by an Order in Council the petition of the appellant was referred to the Committee.

It will be observed that this judgement bases the denial of power to create a bishopric upon the grant of an independent Legislature to the Cape and to Natal. Moreover, it is clear throughout the judgement that a Crown Colony was deemed by the Privy Council to be one in which the King retains his power to legislate by Order in Council. In the case of Natal they did not advert to the fact that the Legislature was, unlike that of the Cape of Good Hope, not a representative body, and it is possible that this point had escaped their notice. It is also possible that they assumed that the letters patent establishing a Legislature of Natal could not be revoked, as they contained no power of revocation. It would seem certain, both on grounds of unbroken practice and of principle that the decision must be restricted in law to cases where a representative Legislature existed; this indeed is clearly the basis of *Campbell* v. *Hall*,[1] and, moreover, as it is clearly the case from the *Colonial Laws Validity Act*, 1865, that a non-representative Legislature cannot alter its Constitution,[2] Natal would have been unable to change its Constitution at all, if this dictum of the Privy Council applied to non-representative Legislatures. As a

[1] 20 St. Tr. 239.

[2] In order to allow British Columbia to do so an Imperial Act, 33 & 34 Vict. c. 66, was passed, then by an Order in Council under it of August 9, 1870, a legislative body of nine elective and six nominee members was created, and it altered its Constitution (see the preamble to British Columbia Law, No. 147, 1871).

matter of fact, new letters patent in 1856 granted a representative legislature, and, in the case of the Cape, letters patent of 1850 permitted the existing nominee council to establish a Parliament. The Judicial Committee's decision, however, might well be regarded as sound, on the ground that in the Cape the Crown had no power of legislation, and the authority of an external bishop in the Cape over a bishop in Natal could thus not legally be constituted, as it could only legally be constituted if there was in both cases a power of legislation by Order in Council. The validity of the judgement, however, in regard to Colonies with representative institutions, is of course unquestionable, and it determined once and for all the status of bishops in the Colonies.

The question came up for further decision in the case of the *Bishop of Natal* v. *Gladstone*,[1] which was decided in 1866 by Lord Romilly, Master of the Rolls. In that case the bishop sued Mr. Gladstone, one of the trustees of the Colonial Bishoprics' Fund, for arrears of his salary, and it was decided by the Master of the Rolls that he was entitled to his salary. This judgement of the Master of the Rolls is of great importance, because it laid down a clear distinction between two forms which might be adopted by the Church of England in the Colonies. In the one case the members might remain members of the Church of England and be bound among themselves by agreement by the constitution of that Church; if then any disputes as to rights arose amongst such persons they would fall to be determined by the civil Courts (for there was no such thing as an Ecclesiastical Court in the Colonies) according to the law of the Church of England as declared by the English Courts from time to time. Their bishops would be consecrated by the bishops of the Church of England in accordance with the rules for the consecration of bishops. On the other hand, it was possible for a Church to be set up which was in full communion with the Church of England, but which nevertheless by agreement or by Act of the Colonial Legislature would have a completely separate constitution, and that constitution would be a matter to be

[1] 3 Eq. 1. The decision is not wholly compatible with that of the Privy Council, and so far is of inferior value.

decided by the Courts according to the agreement, or according to the legislative enactment.

It is the more important that the real status and condition of the Colonial Churches should be constantly present to the mind, because, as it appears to me, erroneous notions prevail to a great extent on this subject. Some persons seem to imagine that they were founded and endowed in order that the association in each Colony should form a separate and independent Church. So far has this been carried that it seems to be supposed that, if the members of such Colonial Church, or a majority of them, should so think fit, they might, if dissatisfied with the person whom the Crown has appointed to be their bishop, withdraw from his superintendence and elect a bishop for themselves.

That any number of persons, if they so pleased, might, though holding the doctrines of the Church of England, reject, either wholly or in part, the discipline and government of the Church, though they preserved still the creed, faith, and doctrines of the Church of England, is unquestionable. Such an association might elect their own bishop; they might divide the district in which they reside into sees, and elect a bishop for each; they might parcel the district out into parishes and appoint a minister to officiate in each parish; all this they might do, and all this would be perfectly legal, and all this would be binding on the members of the association who assented to it—as it is now in the Episcopal Church in Scotland, which is not, and by the Act of Union is prohibited from being, a part of the Church of England, and in which the Crown is prohibited from appointing or nominating any bishop. If dissensions arose amongst the members of such a Church, they must have recourse to the civil tribunals; but when they did so the question would be tried by their own rules and ordinances, which would have to be proved by evidence in the usual manner. But this association would not be a branch of the Church of England, although it might call itself in union and full communion with it.[1] By the law

[1] Judged by this standard, the Australian churches would already have ceased to be parts of the Church of England, and the judgement is inconsistent here with *Merriman* v. *Williams*, 7 App. Cas. 484, which recognizes that these differences in the election of bishops or the constitution of new ecclesiastical tribunals in the Church of the Province of South Africa (see C. 979, pp. 36, 37) would not sever connexion with the Church of England, since these differences were unavoidable, but severance was effected by the rule (Art. I (3)) that the Church did not follow in matters of doctrine the decisions of the English Courts.

of the Church of England, the Sovereign is the head of the Church; and in substance (for the *congé d'élire* is nothing more than a form) no bishop can be lawfully nominated except by the Sovereign, nor, as I apprehend, could any person be legally consecrated a bishop of such Church unless by the command of the Sovereign. If the members of the Inns of Court were to present one of their preachers to the Archbishop of Canterbury, saying that they had elected him Bishop of the Inns of Court, and prayed that he might be consecrated, although the most reverend prelate might feel disposed to accede to such prayer, I apprehend that he could not lawfully do so, and that upon application a prohibition would issue from the Court of Queen's Bench to prevent such a consecration. So, in like manner, the members of the Church in Natal might elect a divine and call him Bishop of Natal, or invest him with any other title; but even if the Archbishop of Canterbury could be induced to consecrate such a person in due form, he would, I apprehend, have no legal authority to exercise any of those functions which belong exclusively to a bishop of the Church of England. What his peculiar status in the Catholic Church of Christ might be, I do not profess to state; but I apprehend that he would not be a bishop of the Church of England, and that, when the validity of his ordinations and consecrations came to be contested in a Court of law, they would not appear to have made the persons ordained priests or deacons of the Church of England, nor would the places consecrated by him belong to that Church.

He pointed out that the view which he took was in accordance with the legislation on the subject in England with regard to the consecration of bishops in countries not within the dominions of the Crown, or for service in the Colonies, quoting the Acts of 1786, 1819, 1840, 1852, and 1853. The members of the Church in South Africa might make an agreement for an ecclesiastical tribunal to try ecclesiastical matters between themselves, and might agree that the decisions of such a tribunal should be final whatever their nature or effect. This civil tribunal would enforce the decisions against all persons who had agreed to be members of such an association without questioning the propriety of their decision, but such an association would be distinct from, and form no part of, the Church of England, whether it did or did not call itself in union and full communion with the

Church of England. It would strictly and properly be an Episcopal Church not of, but in, South Africa, as it is the Episcopal Church in Scotland but not of Scotland. He strongly recommended that for the sake of uniformity the Church of England should have branches in the Colonies instead of their being separate and independent Churches. It was a mistake to think that the Bishop of Cape Town had been held to have no effective ecclesiastical jurisdiction. As a matter of fact, the decision was that he had jurisdiction, but he must administer it in accordance with the doctrines and discipline of the Church of England, and in a manner in accordance with the principles of justice, and that whether or not it were so administered was a question that was to be decided by the civil Courts of the Colonies.

He accordingly held that the Bishop of Natal was sufficiently a bishop of the Church of England as to be entitled to receive the emoluments of his office. He added, however, that if the bishop had failed to carry out his duties he might have been refused his salary.

There was some real inconsistency between this case and that of *in re The Lord Bishop of Natal*, but in mentioning the case in *ex parte Jenkins*[1] the matter was disposed of, when in the case of the Bishop of Newfoundland a question arose with regard to his authority in the Bermudas, by the fact that such authority was conclusively authorized by various Colonial Acts. In *Merriman* v. *Williams*,[2] however, the rules of connexion between the churches were more precisely defined.

The Law Officers of the Crown in April 1869 were asked to advise what steps could be taken to try the bishop, assuming that he was guilty of an ecclesiastical offence.[3] They mentioned in their opinion that the Colonial decision in the *Bishop of Natal* v. *Green* had shown that there had been some misapprehension in the view of the Privy Council as to the status of the Colony,[4] and it might be that the letters

[1] 2 P. C. 258. Cf. 3 P. C. 1, at p. 13.

[2] Above, p. 1433, n. 1.

[3] Forsyth, op. cit., pp. 60, 61.

[4] This was probably the case. The Colonial Court (1868 N. L. R. 138, Phillips J. *diss.*) accepted the view that the letters patent were valid and did confer jurisdiction, when Mr. Green sought to ignore his bishop on the faith of the earlier decisions.

patent granted were really valid, which no doubt was the case. The Archbishop of Canterbury had no jurisdiction, in their opinion, to inquire into the doctrines of the bishop, and the Crown had no power to appoint commissioners, or the Privy Council to hear the action, for though the Crown was supreme over all causes ecclesiastical, it was so in no other sense and to no greater extent than in causes temporal, that is, by law and by means of the established Courts. The High Commission Court was illegal, and to refer the matter to the Privy Council under the Act of 1832 would be to re-establish the High Commission Court. A *scire facias* to revoke the letters patent would only apply to an improvident grant, and very possibly the letters patent were valid. There was, therefore, no Court which they considered capable of deciding the question of his holding or not holding heretical opinions.

It is clear, however, from the remarks of the Master of the Rolls in the case of the *Bishop of Natal* v. *Gladstone* that the matter could have been settled by the trustees refusing to pay the bishop on the ground of his heretical opinions, when the matter would have been decided by the Court of Chancery and, on appeal, by the House of Lords.

The decision of these cases once and for all made clear the position of Churches in the Colonies. It is still possible for a bishop to be consecrated by an archbishop of the English Church with the permission of the Crown for service in some place either in or without His Majesty's dominions,[1] but such consecration carries with it no grant of jurisdiction.[2] The members of the Church of England in the place in question would be assumed to assent to the doctrines of the Church of England, and questions of civil right, depending on questions of doctrine would be decided by the principles of the Church of England. Such bishops are from time to time consecrated for service in the Crown Colonies and

[1] Cf. Anson, *Law and Custom of the Constitution*, II. ii, 247–9.

[2] Nor is any special diocese assigned; this was asked for by the Bishop of Sydney in 1872, but Lord Kimberley declined to change the practice; see New Zealand *Parl. Pap.*, 1872, A. 1 a, p. 31. Cf. *Hansard*, ser. 3, clxxxvii, 256, 762; Adderley, *Colonial Policy*, pp. 395 seq.; *Parl. Pap.*, H. C. 259 II, p. 50. The title Lord Bishop is now incorrect, *Parl. Pap.*, C. 3184, p. 7; Right Rev. is used officially.

abroad. They are members of the Church of England proper, and the Church is a real branch of the Church of England.

On the other hand, there exist large numbers of bishops in the Colonies who are members of Churches more or less closely allied to and in communion with the Church of England in the United Kingdom, but whose Churches are quite autonomous bodies in no way subject to the control of the Church of England,[1] and civil questions regarding which are decided not on the basis of the law of the Church of England, but on the basis of the contract or legislative enactment establishing the constitution of the Church in question.

The number of cases which deal with the various Colonial Churches is very great.[2] One of the most recent and interesting is the case of *Macqueen* v. *Frackelton*,[3] which was decided in the High Court of the Commonwealth of Australia in 1909. In that case a minister of the Presbyterian Church of Queensland had been guilty, in the opinion of the Presbytery of Brisbane, of unsatisfactory conduct. The Presbytery recommended to the General Assembly, which was the Supreme Court of the Church in Queensland, that that body should dissolve the tie between the plaintiff and his congregation. The plaintiff and other members of the Presbytery dissented and gave notice of appeal to the General Assembly. He also brought an action against all the members of the Presbytery, except himself, to restrain any proceeding upon the resolution as being contrary to the rules prescribed by the constitution of the

[1] This was enunciated clearly in 1873 by the Bishop of Wellington, New Zealand, at the opening of his diocesan synod; see *Guardian*, August 11, 1875, p. 1025. Cf. also Phillimore, *Ecclesiastical Law*, II. x, chap. 3. The constitution of the New Zealand Church was in part drafted by Sir G. Grey; see Collier, *Sir George Grey*, p. 88; Rusden, ii. 456.

[2] Cf. *Johnston* v. *Ministers and Trustees of St. Andrew's Church, Montreal*, 3 App. Cas. 159; *Alexandre* v. *Brassard*, [1895] A. C. 301; *Polushie* v. *Zacklynski*, 37 S. C. R. 177; [1908] A. C. 65; *Deeks* v. *Davidson*, 26 Gr. 488; *Brown* v. *Curé etc., de Montreal*, 6 P. C. 157; *Murray* v. *Burgers*, 1 P. C. 362.

[3] (1909) 8 C. L. R. 673. Cf. *Tovey* v. *Houison*, 7 C. L. R. 393, at p. 406.

Presbyterian Church. The General Assembly, hearing of this, and on his admission that the writ had been issued, resolved to suspend him, which, under the constitution of the Church, involved the dissolution of the pastoral tie and the loss of his emoluments. The plaintiff then brought an action against the General Assembly and the Presbytery jointly for a declaration that the sentence passed was illegal and void, and for a mandamus to restore him to office. It was held in the second action by the Supreme Court of Queensland, and on appeal by the High Court of Australia, on the construction of the terms of the consensual compact existing between the members of the Church in Queensland, that the respondent had submitted himself to the control of the Presbytery and the General Assembly only in matters within their jurisdiction under the compact, and that the General Assembly had acted in breach of the compact in summarily suspending the plaintiff from office and thus depriving him of emoluments to which he was entitled, and that therefore the suspension was illegal and void. It was held also by the majority of the Court (Griffith C.J. and O'Connor J.) that the issue of the writ in the first action was not a violation of the plaintiff's vow of submission to the jurisdiction of the Courts of the Church. The order of the Supreme Court of Queensland [1] had directed that the plaintiff should be at liberty to apply for such relief by way of mandamus, injunction, or otherwise as he might be advised, and their order was altered by the omission of the word mandamus, as suggesting an order in the nature of an order for specific performance of an agreement for the establishment of personal relations between parties.

The first action brought by the plaintiff to restrain any proceeding upon the resolution was successful before the Chief Justice of the Supreme Court of Queensland, but the decision was reversed by the full Court, and leave to appeal

[1] 1909 St. R. (Qd.) 89. In the first action judgement was given by Cooper C.J. for the plaintiff, but that judgement was reversed by the full Supreme Court, and its decision was upheld by the High Court on the ground that up to the issue of the writ there had been no legal wrong to the plaintiff.

was refused by the High Court on the ground that up to the issue of the writ in that action no civil right of the plaintiff had been infringed.

It was clearly laid down by all the judges that the Presbyterian Church, like any other religious body in Australia, was in the eyes of the law a voluntary association, the mutual relations and obligations of the members of which were regulated by the terms of an agreement to which they were parties, and which had been adopted partly in 1863, when several Presbyterian congregations formed themselves together as an ecclesiastical body under the name of the Presbyterian Church of Queensland, and partly in 1874, when a scheme for the general management of Church affairs was drawn up providing for the administration of the Church on the general principles of the Presbyterian Churches in all parts of the world.

An Act of Queensland was passed in 1900 under which it was contended by the appellants that the Courts set up by the agreements were independent judicial institutions of the State, whose proceedings could not be called in question in the Supreme Court. That view was rejected out and out by the full Court of Queensland, and the High Court repeated the condemnation, saying it was for the Court and not for the parties to determine the interpretation of the contract. The majority of the Court also held that the plaintiff could not lose his right to bring a case. It was always in the power of a Court of Law to interpret and give effect to a compact when any civil right depended upon its terms. It could not be held that the minister of the Presbyterian Church was to be in the position of members of the Roman Catholic Church, and to surrender all his future prospects and living into the hands of an infallible General Assembly. The Chief Justice thought also that the *Cardross*[1] case was authority for holding that the issue of a writ in such a case was not a breach of the ordination vow.

O'Connor J. shared the same opinion. He admitted, however, that a voluntary association might bind its members

[1] *McMillan* v. *The Free Church of Scotland*, 22 D. 290. Cf. 23 D. 1314.

by a stipulation that the interpretation of the terms of association should be exclusively in the hands of a judicial body empowered to decide without question the limits of its own jurisdiction, and that the penalty of questioning the decisions of that tribunal should be expulsion from the association or a temporary loss of its benefits, but there was no such self-surrender or abrogation of rights in the contract in question, and the whole contract abounded in provisions for securing to members the preservation of rights and a fair trial of accusations. Moreover, the *Cardross* case was an authority in favour of the view which he took. Isaacs J.[1] also rejected any universal claim for exclusive jurisdiction in the Church Courts. He said :

But these tribunals, though conveniently enough styled ' Courts ', are not Courts in the legal sense. They have no jurisdiction properly so termed. The law invests them with no coercive power, with no authority to issue process, or to declare, determine, or enforce rights, and they are strictly dependent for such so-called jurisdiction as they possess upon the consent of the parties who are subject to it. In this respect the Act of 1900 makes no difference. That Act merely gives legal effect to an agreement for federal union, and bestows no changed character on the tribunals then already existing in the several states beyond subordinating them to the final decision and paramount authority of the Federal Assembly. All powers exercisable by the association, legislative, judicial, or administrative, if intended to bind its own members, must spring from their consent, and do not arise from the authority of the general law.

He concluded from the decision in *Long's*[2] case, and from the principle laid down there by Lord Kingsdown, that if a man made a voluntary submission he could not complain of the results of this submission. He thought that this was brought out by the authority of the Scottish judges in the *Cardross*[3] case, but of course subject to the constitution which he accepted not containing some provision contrary to law, for such a provision could not be enforced. But that position was quite distinguishable from a provision

[1] 8 C. L. R. 673, at pp. 704 seq.
[2] 1 Moo. P. C. (N. S.) 411.
[3] 22 D., at pp. 314, 315.

that rights were to be dependent upon or to be measurable or determinable by the opinion of a designated organ of the general body, conveniently called a domestic tribunal. There was no principle which rendered illegal a provision, not that a person should not appeal to the Courts of the land, but that if he did so appeal he should cease to be a member of the body which he had joined.

Thus the English Church in the Colonies is a voluntary association and has no coercive power. The rights of its members depend upon the constitution of the Church, which by becoming members they accept, and they will be interpreted according to the ordinary principles of law by the Courts of the Dominions.[1]

§ 2. The Position of Colonial Clergy

The position of Colonial clergy in England, which was very obscure when the legal decisions established the distinction between the Church of England, in the true sense of the word, and the Churches in the Colonies which were not really parts of the Church of England, though it might be in communion with it, has been cleared up by the express provisions of the *Colonial Clergy Act* of 1874.[2] That Act lays down definitely on what conditions Colonial clergymen can officiate in English churches and hold preferment, and as regards them the matter is regulated by statute and will not present substantial difficulties in future. It should be noted, however, that the anticipations of the Master of the Rolls in the case of the *Bishop of Natal* v. *Gladstone* have not

[1] Cf. *Gladstone* v. *Armstrong and another*, [1908] V. L. R. 454; *Attorney-General* v. *Williams*, 7 S. R. (N. S. W.) 826; *Dunstan* v. *Houison*, 1 S. R. (N. S. W.) (Eq.) 212; *Fielding* v. *Houison*, 7 C. L. R. 393; 7 S. R. 677; *Lindley* v. *Jones*, 16 C. T. R. 695; *Public Trustee* v. *Commissioner of Stamps*, 26 N. Z. L. R. 773. Cf. 26 & 27 Vict. c. 121.

[2] 37 & 38 Vict. c. 77. The matter was discussed in 1867; see *Hansard*, ser. 3, clxxxvii. 256, 762. It was introduced by Lord Blachford in 1873 (*Hansard*, ccxvi. 484), and then was intended also to settle the position of episcopal property, which it purported to vest in the future elective bishops. But in 1874 that was left for the local legislatures; see *Hansard*, ccxviii. 1804; *Parl. Pap.*, C. 979.

been in the slightest degree fulfilled. He was then of opinion that the future would see the development of the Church of England by branches which were real branches of the English Church governed by the principles and rites of the English Church. This has not been the case. The natural and local desire for autonomy in civil matters has extended to religious questions, and throughout the Dominions the Churches which have been established have made themselves independent Churches in union and communion with the English Church, but in no sense portions of that Church. They are autonomous communities, and their government differs considerably from the Church of England proper. Unquestionably this has all been for the good, inasmuch as the local freedom of the Church has stimulated its exertions and prevented it acquiring the unpopularity which would certainly have been the fate of bodies controlled from home. Moreover, it has been the definite policy of the Archbishops of Canterbury to encourage full local autonomy. This is shown by their attitude towards those in Natal who desired to maintain the position adopted by Bishop Colenso, and to preserve in Natal a Church which should be a true branch of the English Church and not a branch of the English Church in South Africa, a Church in communion and union with the English Church, but not a branch of the English Church proper. Petition after petition has failed to induce the archbishops to consecrate a bishop of the English Church to minister in Natal, with the result that the Church must die out for lack of ordained clergymen to maintain its ministrations.[1]

The provisions of the *Colonial Clergy Act* of 1874 are briefly

[1] *Parl. Pap.*, C. 5489, 1888. There was no proper successor to the Bishop in Natal, and the property of the see was vested in curators. A Bishop of Natal exists, but he is subject to the South African Church; he was consecrated in 1893 under a royal mandate by the Archbishop of Canterbury. There has been much litigation; see e. g. *Board of Curators of Church of England* v. *Durban Corporation and H. E. Colenso*, (1900) 21 N. L. R. 22; *Moses Sibisi* v. *Curators of Church of England*, ibid., 90. See also Dilke, *Problems of Greater Britain*, ii. 418 seq. Act No. 9 of 1910 decides the ownership of the properties, but it maintains in part the distinction of the Churches (sec. 3, *c* and *d*).

as follows: No person ordained priest or deacon by any bishop other than a bishop of the Church of England or the Church of Ireland, shall officiate as a priest or deacon in any church or chapel in England without written permission from the archbishop of the province in which he proposes to officiate, and without making a declaration set out in the Act. Nor can such a person be admitted or instituted to any benefice or other ecclesiastical preferment in England, or act as curate therein, without the previous consent in writing of the bishop of the diocese. The archbishop, however, may issue a licence to any person who is holding preferment or acting as curate who has the written consent of the bishop of the diocese, and on receipt of the licence the person in question shall be in the same position as if he had been ordained by a bishop of a diocese in England, but no such licence can be issued until the person in question has held ecclesiastical preferment or acted as curate for a period exceeding in all two years. Acts contrary to this Act are penalized, and all appointments, admissions, institutions, or inductions to preferment and appointments to act as curate contrary to the Act are declared to be null and void. The persons who are ordained under the Act of 1852 are exempted from the provisions of the Act of 1874. The Act of 1852 referred to bishops of the bishoprics in India and persons ordained by them, and to persons ordained by any bishop who by virtue of letters patent should have exercised the office of bishop in India or in any of Her Majesty's Colonies or foreign possessions. By the Act of 1874, the bishop need not be one appointed by letters patent but he must be a bishop in communion with the Church of England, and the ordination must be subject to the same provisions as to the title and oaths of the persons to be ordained as if it had been performed by the bishop of the diocese. Moreover, the Act of 1852 applies only to persons so ordained at the request of the bishop of an English diocese, and is therefore of no importance.

Bishops of these independent Churches can be consecrated by other Colonial bishops without special form and without

any interference of the Crown, which has no direct concern with non-established Churches, but if consecrated in England the consent of the Crown is requisite, and this applies also to those bishops who are consecrated for service in the Crown Colonies and Protectorates. In such cases it would still be possible, by the legislative power of the Crown, to provide bishops with coercive jurisdiction, but the principle has been steadily observed that bishops should not be given coercive jurisdiction even where[1] the Crown has power to confer it.

It was under consideration after 1791, when the King was empowered to make the Upper Houses in the Canadas hereditary and to annex titles of honour to seats in it, and the Law Officers of the Crown were asked, whether the Bishop of Nova Scotia could not be given a permanent seat in the Upper House, but the whole project fell through, and the Law Officers evidently thought that as far as the bishop was concerned the idea was not legally practicable. It used, however, to be the custom as a matter of course to give the bishop for the time being a seat in the Legislative Councils of Nova Scotia and New Brunswick,[2] and an Act of New Brunswick of 1852 which purported to deprive him of such a seat was disallowed as an interference with the royal prerogative.[3] The bishops were all nominated on the nominee councils which preceded responsible government in the Australian Colonies, and their influence and authority was unquestionably very great. But their position was completely changed on the introduction of responsible government, though for a long time they retained, and to some

[1] It could be done in places falling under the *British Settlements Act*, 1887 (Gold Coast, Gambia, Sierra Leone, Southern Nigeria, Falkland Islands), in St. Helena (cf. 3 & 4 Will. IV. c. 85), in Ceylon, Fiji, Malta, Gibraltar, Hong Kong, Trinidad, St. Lucia, Mauritius, Seychelles, British Guiana (conquered or ceded Colonies), in Jamaica (29 & 30 Vict. c. 12), in Grenada and St. Vincent (39 & 40 Vict. c. 47 probably authorizes this) and the Straits (29 & 30 Vict. c. 115). It could not be done in the Leeward Islands or Bahamas, Bermuda, Barbados, British Honduras, or Turk's Island.

[2] He only once sat there, in 1825; see Hannay, *New Brunswick*, i. 407.

[3] *Parl. Pap.*, H. C. 529, 1864, p. 35.

extent still do retain, precedence, which is a relic of the former connexion of the bishop and the State, although it has now been totally modified by the admission of Roman Catholic bishops to equality of precedence. The part played by the Roman Catholic Church in politics in Canada and in Newfoundland has, however, always been most marked, and in Newfoundland especially the Roman Catholic archbishop has had a degree of political power which is quite remarkable, and which under Sir Robert Bond's Ministry appears to have caused it to be quite a natural thing that he should be approached by gentlemen who desired to be made members of the Executive Council.[1] The most extraordinary fact, perhaps, is that this action should have been passed without serious comment in the press of the Colony.

In Canada the action of the Roman Catholic Church has predominated in Quebec,[2] and its strength has seriously affected Dominion politics, for the attack on the liberties of Manitoba over the question of education was forced upon the Conservative Government by the belief that it was necessary to maintain the allegiance of the Catholic Church by securing their control of the religion of the French part of the population of Manitoba.[3] The defeat of that Govern-

[1] *Evening Telegram*, January 24 and 25, 1908; *Daily News*, January 27; *Evening Chronicle*, January 24.

[2] In Quebec the Church has the power to collect dues from Catholic members by the law, controls education, but is entirely autonomous as to appointment of bishops, &c. The Pope issues commands which are treated as laws, e.g. *re* mixed marriages. See Goldwin Smith, *Canada*, pp. 122 seq.; Dilke, *Problems of Greater Britain*, i. 79 seq.; Willison, *Sir Wilfrid Laurier*, i. 53 seq., 253 seq.; ii. 40 seq.; *Canadian Annual Review*, 1909, p. 408; 1910, p. 625; Galt, *Church and State*; David, *The Canadian Clergy*; Lindsay, *Rome in Canada*; Sellar, *The Tragedy of Quebec*; 2 P. C. 157, at pp. 173. 204 seq.; Egerton, *Canada*, pp. 52–4, 70, 107, 108, 319–24.

[3] The Catholic Church cast all its strength in the scales against Sir W. Laurier, and the clergy ordered their parishioners to vote against him. In 1877 an election was declared void because of clerical interference; *Brassard et al.* v. *Langevin*, 1 S. C. R. 145. For the Catholic Church in Canada, see 14 Geo. III. c. 83, s. 5; 31 Geo. III. c. 31, s. 35. The nominal supremacy of the Crown retained by the Act of 1774, though repeated in the earlier royal instructions (cf. *Parl. Pap.*, H. C. 94, 1838, pp. 71, 72), is habitually violated. Monastic institutions are recognized: see *Parl. Pap.*, H. C. 385, 1877; c. 1828.

ment in 1896 has led to a more satisfactory relation between Church and State, and papal influence has been directed against interference in politics, but there are signs that difficulties may arise in the future, as the Church in Quebec is credited with no enthusiasm for the military and naval projects of the Dominion Government, and in 1910 the Drummond and Arthabasca election was carried by them, and against Sir W. Laurier's nominee.

The extraordinary position occupied by Rome in Canada was seen in 1909 when the first Plenary Council was held there by command of the Pope, followed in 1910 by the Eucharistic Congress. The Governor-General was absent in the Hudson Bay territory, but the Administrator, Mr. Girouard, went out of his way to welcome the Legate, and soldiers in uniform met him, though in Parliament the Government spent its time in disavowing the official character of these acts. The Legate himself, with good taste, proposed the royal health before that of the Pope.[1]

§ 3. Church Endowments[2]

In the Constitution Acts of the self-governing Colonies it was customary at first that sums should be reserved for religious purposes, in the same way as they were reserved for the civil Government. In the case of North America the position was altogether peculiar. By the Act of 1791 (31 Geo. III. c. 31) it was intended to endow permanently the Church of England in Canada, and it was laid down by ss. 36–42 that the Governor might be authorized by His Majesty to make allotments of land within each province for the support and maintenance of Protestant clergy, so that whenever any grant of land was made in either province there should be a proportional appropriation of lands within the township or parish, or nearly adjacent to the township

[1] Cf. *Canadian Annual Review*, 1910, pp. 352, 358; on the question of healths, see Queensland *Legislative Council Journals*, 1876, p. 1031.

[2] Endowment is not establishment; in the Crown Colonies, as a rule, there is no established Church, but the Churches are endowed; see the return H. C. 306, 1910. The confusion of endowment and establishment in the discussions in the Commons (xviii. 1042) on June 29, 1910, is remarkable.

or parish in which the lands to be granted were situated. Such lands so allotted and appropriated were to be, as nearly as the circumstances and nature of the case admitted, of the like quality as the lands in respect of which they were allotted and appropriated, and they were to be, as nearly as could be estimated at the time of making the grant, equal in value to the seventh part of the land so granted.[1]

The Governor, with the advice of the Executive Council in either province, was authorized to constitute within each township or parish one or more parsonage or rectory, according to the establishment of the Church of England, and to endow by instrument under the Great Seal of the province each parsonage or rectory with the portion of the land appropriated for the maintenance of the Protestant clergy.

To these parsonages His Majesty could authorize the Governor to present incumbents duly ordained according to the rites of the Church of England, and these incumbents were to have the same rights and privileges as the incumbent of a parsonage or rectory in England. In s. 40 of the Act there was a saving of the spiritual jurisdiction and authority accorded by the letters patent of 1787 to the Bishop of Nova Scotia. The provisions of the Act could be varied by the Legislative Council and Assembly of either province, but such Acts required to be laid before both Houses of Parliament for thirty days before the royal assent could be signified, and the assent would be refused if either House of Parliament asked His Majesty so to do. A limited power of sale was given in 1827 by 7 & 8 Geo. IV. c. 62.

In the Union Act of 1840 (3 & 4 Vict. c. 35) it was provided in s. 42 that the Bills to repeal the provisions of the Act of 1791 must be laid before Parliament for thirty days before assent. Another Act of the same year (3 & 4 Vict. c. 78) allowed the sale of all the reserves, the proceeds to be used in paying the stipends of existing clergy, and the rest being divided half among the English and Scottish Churches, and half among other Protestant denominations.

[1] Cf. Earl Grey, *Colonial Policy*, i. 253; Pope, *Sir John Macdonald*, i. 75 seq. Any appearance of establishment vanished by 18 Vict. c. 2, s. 3.

The reservation of these lands was a source of the greatest possible trouble.[1] Fifty-seven rectories were created in 1836 by the Lieutenant-Governor of Upper Canada, Sir John Colborne, and his right of doing so was established in a case decided on August 25, 1852, and reported in full in vols. v and vi of Grant's *Chancery Reports*. Difficulties arose in carrying out the provisions; it was contended by other Protestant denominations that it was not proper that the English Church alone should profit by the arrangements, and it was admitted by all the judges when consulted in 1840 that the term 'Protestant clergy' would at any rate cover the case of the Church of Scotland, which was an established Church equally with the Church of England. Finally, in 1853 an Imperial Act was passed to authorize the Legislatures of the provinces of Canada to make provision concerning the Clergy Reserves in the provinces and the proceeds thereof. Under the authority of this statute and of the terms of the Union Act, Clergy Reserves were secularized in 1854 by an Act of the Canadian Parliament (18 Vict. c. 2). The right of the Governor to endow rectories under the authority of the Act of 1791 was taken away by an Act of the Canadian Parliament in 1851 (14 & 15 Vict. c. 175), entitled 'An Act respecting Rectories.' This Act expressly left the legality of existing endowments to be settled by the Courts of Law, and their legality was declared by the Court of Chancery in 1852. Thus ended the difficulties of the question as to Church reserves in the Dominion.[2]

In the case of the Maritime Provinces there was no trouble with regard to religious endowments, and though an Act passed by New Brunswick in 1852 to remove the bishop from the Legislative Council was refused the assent of the Crown on the ground that it was an interference with the royal prerogative of appointing members to the Legislative Council,

[1] See Hincks, *Religious Endowments in Canada* (London, 1869); Walrond, *Letters and Journals of Lord Elgin*, pp. 134–44; Houston, *Constitutional Documents of Canada*, pp. 147, 184.

[2] It should be noted that nothing was done to touch the Catholic priests' rights under the Act of 1774, s. 5; MacMullen, *History of Canada*, p. 528.

the ground of the refusal was not any special desire to enforce contributions for religious purposes.[1]

In the case of the Australian Colonies,[2] reservations for religious purposes were included in the Constitution Acts of New South Wales of 1855, Victoria of 1855, and Tasmania of 1854, but no such provision was included in the Constitution of South Australia of 1856, where there had always been strong opposition to the English Church ; nor in the case of Western Australia, when in due course in 1890 it was constituted. In the case of Queensland the Act of 1867 in Schedule A provided £1,000 for public worship. But in all cases it was laid down that the appropriation for public worship was not a matter in which the Imperial Government desired to insist upon their own views, and it was open for the Parliaments of the Colonies to repeal the amount reserved in the Schedules, or to alter them as they thought fit, and the amount was distributed among the several denominations by the action of the Government according to the principles of concurrent proportionate endowment. In 1862 (No. 19) after a struggle with the Upper House the grant was revoked in New South Wales, with a saving of existing rights.

In the case of Tasmania a Bill of 1859 for this purpose was disallowed, but later on, in 1868, when the Act was re-enacted, it received sanction.[3] Similarly an Act (No. 3) of 1860 ended it in Queensland.

In the case of Victoria the Upper House for many years prevented the repeal of the appropriation for religious services under the Constitution, but eventually in 1871 (No. 391) it also assented to the change being made.

In the case of New Zealand no appropriation for religion was included in the Constitution Act, nor was such appropriation made in Newfoundland.

From the returns rendered in 1910 in response to an

[1] *Parl. Pap.*, H. C. 529, 1864, p. 35.

[2] Cf. Earl Grey, *Colonial Policy*, ii. 335 seq.

[3] See 32 Vict. No. 30. It gave a capital sum to each of the religious denominations which had participated in the grant of £15,000 a year.

address from the House of Commons,[1] it appears that there are no grants in respect of religious services in the Colony of Newfoundland, nor is any money paid out of public funds for the maintenance of such services, or for the building or repair of places of worship.

In the Commonwealth of Australia a few small payments are still made in New South Wales to clergymen under Schedule C of the Constitution, but further grants were abolished in 1862.

There is no public assistance given to religion in Victoria other than payments to visiting chaplains to hospitals for the insane, and visiting chaplains to the various prisons.

There is no expenditure on religious services in Queensland or in South Australia. The only expenditure is incurred in providing religious services in the Adelaide jail and the labour prisons at Yatala.

In Western Australia the only provision is for services in the lunatic asylum and in jails.

In Tasmania, the last Colonial chaplain died on April 25, 1902, from which date ceased the contributions made to the Church of Rome, the Wesleyan Church, and the Free Church of Scotland. After December 31, 1902, the payments which had been made to the Church of England—£100 a year—and to the Church of Rome—£70 a year—for the purposes of supplying chaplains for the prisoners and insane, ceased.

In New Zealand the only expenditure is a sum of under £50 a year for the carriage hire, &c., of ministers of religion conducting services at mental hospitals.

In the Cape of Good Hope, prior to 1895, the sum of £16,060 was annually reserved by the Schedule to the Constitution Ordinance of 1852, for the services of religious worship. The Act No. 5 of 1875,[2] which took effect on June 30 of that year, repealed the Schedule, and while securing the continuance of the salaries of the then incumbents until death or resignation, provided that should any minister die or resign within five years from the taking effect of the Act,

[1] *Parl. Pap.*, H. C. 337, 1910.

[2] See Wilmot, *South Africa*, i. 142 seq.

his successor should only receive salary till the expiration of the said five years. But a minister in receipt of a salary at the taking effect of the Act, who at any time resigned his post in order to accept a vacancy where the previous incumbent was also in receipt of such salary, was to receive until death or resignation the same salary from public funds as his predecessor in the vacancy. In 1910 four members of the Church of England, and four members of the Dutch Reformed Church were still receiving allowances in accordance with that Act. Nothing was paid in Natal.

In the Orange River Colony in 1909–10 a sum of £8,380 was spent on religious services, divided between the Dutch Reformed Church, the Church of England, the Reformed Church, the Wesleyan Church, the Presbyterian Church, the Lutheran Church, the Roman Catholic Church, the Hebrew Congregation, and the Baptist Church.

In the Transvaal the expenditure on religious services has been in connexion with hospitals, lunatic and leper asylums, convict and other prisons, with £20,000 to repair the ravages of the war.

In Canada payments were made only in respect of prison and asylum services by the Dominion Government, and by the Provincial Governments of Ontario, New Brunswick, Manitoba, and British Columbia. But it must be remembered that the Catholic Church in Quebec still enjoys all the privileges conferred on it by the Quebec Act of 1774,[1] and that an ultramontane Legislature in 1888[2] made good to the Jesuits the property of which they were deprived in 1763. The Act was much opposed in Canada, outside Quebec, but the Dominion Government no doubt rightly declined to interfere with a very marked exercise of provincial autonomy.

It may be added that in New Zealand education is now purely secular, that in New South Wales, Western Australia, and Tasmania there is no denominational teaching, but Christian doctrines are taught, and clergymen are permitted

[1] See Quebec *Revised Statutes*, 1909, Tit. ix.

[2] See *Provincial Legislation*, 1867–95, pp. 407 seq., for the petitions against the Act, and cf. Willison, *Sir Wilfrid Laurier*, i. 258 seq.

entry at fixed times to teach denominational tenets to those desiring such teaching. In South Australia and Victoria religion is now excluded; an attempt was made in 1896 in South Australia to secure its reintroduction by a referendum, but the result was in favour of no change.[1] In Victoria an executive referendum was taken in 1904 and failed, and an attempt by the Upper House to secure a referendum by amending in 1910 an Education Bill failed owing to the solid resistance of the Lower House, but it was admitted that the Ministry was divided on the matter. In Queensland after a referendum in 1910, religious education was restored by Act No. 5 of 1910. In Newfoundland education is purely denominational, Government grants being given to denominational schools. In Canada separate schools exist in Ontario and Quebec, a modified system prevails in Manitoba, and also under the Constitution Acts of 1905 in Alberta and Saskatchewan.[2] In New Brunswick a good deal of latitude is now allowed.[3] In South Africa the public schools are undenominational.[4]

[1] See Commonwealth *Year Book*, ii. 880 seq.; New South Wales Act, No. 23 of 1880; Western Australia Act, 57 Vict. No. 16; Tasmania Act, 49 Vict. No. 15; Parkes, *Fifty Years of Australian History*, ii. 1 seq.

[2] The system is laid down in cc. 29 and 30 of North-Western Territories Ordinances of 1901. See also Part IV, chap. i. On the bilingual question in Ontario see *Canadian Annual Review*, 1910, pp. 419–24; on education, Hodgins, *Historical Educational Papers and Documents*, ii. 95 seq.

[3] See Hannay, *New Brunswick*, ii. 293–317, 362–5.

[4] Cf. *The Government of South Africa*, i. 177 seq.; Cape Act, No. 35 of 1905, s. 33; Natal Law, No. 15 of 1877, s. 19; Transvaal Act, No. 25 of 1907, s. 34; Orange River Colony Act, No. 35 of 1908, s. 18; on bilingualism, see *Parl. Pap.*, S. A. 2, 1911.

PART VIII. IMPERIAL UNITY AND IMPERIAL CO-OPERATION

CHAPTER I

THE UNITY OF THE EMPIRE

§ 1. The Existing Unity

The study of responsible government in the Dominions unquestionably leaves rather the impression of dispersion than of unity; it is, as we have seen, a long record of the giving up of claims to control, and the leaving to the Dominions the power to do as they will in their own affairs. If it has not yet resulted in the grant of a status as international states [1] it is clear that it has gone far upon the way to do so. But this view would be partial and misleading, and the other side of the question becomes obvious when it is remembered that the people and the Crown are ultimately one people and one Crown.

It is of course true that there is a certain tendency to adopt the theory that there is a special species of nationality in each Dominion; that a man is a Canadian, an Australian, a New Zealander, a South African, and there is even some sanction of law for the use of such terms. For example, the immigration law of Canada of 1910 (c. 27) creates a new and strange entity, a Canadian citizen who is defined as a person who is domiciled in Canada, and who fulfils certain conditions laid down in the Act. If such a person leaves Canada he is entitled to return thither whatever happens; he cannot be excluded because he may fall under the categories which otherwise are fatal to an immigrant's chance of passing the tests on entrance.[2] There is no recognition of the idea of an Austra-

[1] The use of the term Sovereign of the States and the Commonwealth in 1 C. L. R. 91, at p. 109; 4 C. L. R. 1087, at pp. 1121, 1126, is corrected by 5 C. L. R. 737, at p. 740.

[2] Cf. Turner L.J. in *Low* v. *Routledge*, 1 Ch. App. 42, at pp. 46, 47.

lian nationality by the High Court of Australia,[1] but it does recognize that a person has a home of his own, and that such a person if he returns to that home is not an immigrant whose entry can be regulated by the Commonwealth under its general power to regulate immigration. There is also some recognition of it in the New Zealand immigration law which, as a rule, though not always, allows a domiciled New Zealander to return to the country after absence, and the immigration bill of the Union of 1911 also recognizes this principle.

There are, of course, other manifestations of the doctrine: it was at one time held in the Canadian Courts [2] that Canada could punish bigamy committed outside Canada by a British subject resident there, and Lefroy [3] makes out that this is consistent with the decision of the Privy Council in *Macleod* v. *Attorney-General for New South Wales*,[4] by holding that the invalidity of the conviction in the latter case was due to the fact that the Act was held to be in too wide terms as applying to any persons and not merely to British subjects domiciled in New South Wales. This interpretation of the statute, besides being very far from being supported by the language of the Court, is open to the fatal objection that if this were the view taken by the Court they would have dealt with the question of domicile in the case of Macleod which was discussed in the Court below. But in New Zealand the tendency clearly is for the Supreme Court to hold that a New Zealander is subject over all the world to the jurisdiction of New Zealand, and that thus New Zealand has a special and peculiar nationality of its own adherent to it.[5]

[1] Cf. 4 C. L. R. 949, at p. 951; 7 C. L. R. 277, at p. 288. But contrast Mr. Pearce's views in Commonwealth *Parliamentary Debates*, 1910, pp. 4326 seq.

[2] *Reg.* v. *Brierly*, 14 O. R. 525; 4 Cart. 665; *in re Criminal Code, Bigamy Sections*, 27 S. C. R. 461.

[3] *Legislative Power in Canada*, p. 329.

[4] [1891] A. C. 455. Lefroy's view is supported by *in re Criminal Code, Bigamy Sections*, 27 S. C. R. 461.

[5] Cf. *in re Award of Wellington Cooks and Stewards' Union*, 26 N. Z. L. R. 394. Jenkyns, *British Rule and Jurisdiction*, p. 31, seems to hold this view, relying on a misunderstanding of 57 & 58 Vict. c. 60, s. 265. The reference on p. 27, n. 3, to 9 Geo. IV. c. 31 as justifying the trial of bigamy committed outside a Colony in a Colony is a blunder.

On the other hand, the difficulties of this doctrine are very great internationally; there can be but one nationality as long as the Empire remains united, and on what criterion could separate nationalities be devised within the Empire? Is a New Zealander to be excluded from privileges offered by treaties to British subjects generally, and if so, what constitutes him a New Zealander? There are various criteria possible; it might be birth, or residence, or domicile; it is impossible to say that any one is a satisfactory basis on which to go, and in many cases there would be great doubt as to which was the proper principle. Yet, if no principle were framed, the plan could not work, while if residence or domicile were adopted as the line of division, a man might be often changing his nationality. It is indeed clear that allegiance to one Crown is the common bond, and that as nationalities there is no future for the conceptions of Canadian, Australian, &c., if these Dominions desire to form parts of the Empire.

It is also clear that at the back of all the diversity of the Crown, which enables us to distinguish between the Crown in its various manifestations—so that the Crown in South Australia and the Crown in Victoria can engage in a dispute before the Courts as to the boundaries of the states in question, and the Crown in the states can be taxed in respect of its property by the Crown under the Commonwealth Parliament[1]—there is a very real sense in which the Crown remains a single personality. In foreign affairs this unity is perfect; no foreign Power dreams of approaching a Dominion Government to demand redress or to ask for reference to arbitration. It is of course always open for a foreign Power through its consular representatives to make friendly requests to a Dominion, as for example with regard to immigration matters, which were dealt with in part direct

[1] *The King* v. *Sutton*, 5 C. L. R. 789; *Municipal Council of Sydney* v. *Commonwealth of Australia*, 1 C. L. R. 208; *The State of New South Wales* v. *The Commonwealth of Australia*, 7 C. L. R. 179; and *passim* in C. L. R. The same principle has recently received emphatic approval by the Privy Council in *The Dominion of Canada* v. *The Province of Ontario*, [1910] A. C. 637.

between the Commonwealth Government and the Japanese Consul-General in Australia, but, where the matter becomes in any sense of the word a question of international right, the foreign Power has recourse to the Imperial Government. Thus, for instance, when the Vancouver riots in September 1907 resulted in damage to Japanese and Chinese property, the formal request for redress was made not direct to the Dominion, but to the Imperial Government. So in 1905 and the following years, when the Government of Newfoundland interfered with rights claimed by the United States, the Government of that country addressed its representations to the Imperial Government;[1] and the cases could be cited indefinitely. Nor is there any chance of this practice being modified as long as the Empire holds together; the essence of an international sovereign state is that there should be a unity which is sovereign, and if the Dominions do not intend to become independent powers they must accept this unity as essential. Of course it would be absurd to imagine that the unity will always maintain the present shape; if the Dominions commence to do more than bear the burden of their own defence, if they begin to bear part of the burden of the Empire as a whole, then they will desire to receive and will have accorded to them a share in the direction of the common international policy. In that way lies the future of the Empire as an empire; any other way means the development of separate states, allied no doubt, but yet not united and not one.

Moreover, there are every now and then cases which remind us that the artificial distinctions of the Crown in its several rights, which are familiar in the federal constitutions, are artificial and are due to the breaking up of the royal sovereignty which is an essential part of any federal Act. In the case of *Williams* v. *Howarth*[2] the unity of the Crown

[1] *Parl. Pap.*, Cd. 3262. Cf. Mackenzie in Canada *Sess. Pap.*, 1878, No. 70.

[2] [1905] A. C. 551, overruling 2 S. R. (N. S. W.) 452. So in Sir B. O'Loghlen's case (member for Clare in 1877–9) his seat was declared vacant in the latter year by a select committee of the House of Commons, owing to his acceptance of the Attorney-Generalship of Victoria, a post held to be under the Crown, though in the gift of the Governor; *Law Times*,

came neatly out ; in that case the New South Wales Government were sued in a New South Wales Court on a contract to pay a soldier ten shillings a day for service in South Africa. The Imperial Government had paid him four shillings and sixpence a day, and the New South Wales Government claimed to set this amount off against the total claim. The Privy Council held that this could be done, and they stated that in such a case there could be no difference asserted between the Crown in its several positions as the Crown in the United Kingdom, and the Crown in the State of New South Wales. Nor can it be held that this judgement is in any way inconsistent with the rule that Colonial claims against the Crown are not subjects in which here a petition of right will normally be allowed ;[1] it cannot safely be said that they will never be allowed ; but in any case the position is simply that a creditor should sue the Crown in the Courts of the Government which contracted the debt, and which is answerable for it. It is not at all likely that the Crown could recover against a defendant who had paid the debt to a Colonial Government, any more than a plaintiff can recover when the debt has been paid by the Crown in some other capacity, and it does not seem that the fact of the claim being a military one could be held to make any difference.[2]

§ 2. Future Prospects

In the period 1884–93, the question of Imperial federation was extremely prominent and was repeatedly debated.[3]

February 11, 1905, p. 34. Cf. also *Sloman* v. *Government of New Zealand*, 1 C. P. D. 563 ; *in re Oriental Bank*, 28 Ch. D. 643 ; *in re Bateman's Trust*, 15 Eq. 355.

[1] Cf. Robertson, *Proceedings by and against the Crown*, p. 340. The author is wrong in thinking that a petition of right is not available against a Colonial Government in the Courts of the Colony ; see Clode, *Petition of Right*. In Dinizulu's case the Attorney-General in England admitted that he had a legal right to the salary promised him from Natal funds. Cf. p. 145.

[2] Harrison Moore, *Commonwealth of Australia*,[2] p. 89, seems to suggest that this is the differentia.

[3] Cf. Ewart, *Kingdom of Canada*, pp. 159–68 ; Dilke, *Problems of Greater*

There was a vague but widespread feeling that some form of closer unity was most desirable, indeed, almost essential, but, on the other hand, there was considerable opposition to the proposal, especially in Australia, and the Conference of 1887 was invited subject expressly to the exclusion demanded by New South Wales from its consideration of the question of Imperial federation. Though the Imperial Federation League was very successful so long as mere general propositions were under consideration, it was found hopeless for the members to agree upon any scheme of a draft federal constitution, and in the result the league was dissolved, as it was found impracticable to adopt any positive policy, and it was becoming clear that a mere attitude of approval of the abstract principle of federation was open to serious comment, and exposed the holders of the doctrine to ridicule. As an alternative to federation Sir Julius Vogel[1] suggested that there should be given to the Colonies a small representation in the Imperial Parliament, the members to be elected by the Dominions and not to be chosen merely by the Dominion Governments, but this suggestion did not prove acceptable. Nor can it be said that the idea of federation has made any substantial advance, or that it has become any more popular. In the case of Canada, the Federal Government does not appear to be anxious to abandon its position, nor is it likely that the Commonwealth Government would consent to surrendering any of its powers. Nor is the Union of South Africa, as far as it appears, more anxious to give up a portion of its autonomy, while no sign exists that the Imperial Parliament is willing to accept federation.

The question then arises as to what the relations can be between the different parts of the Empire as those parts grow in strength relatively to the Mother Country. Mr. Ewart,

Britain, ii. 465 seq.; Jebb, *Colonial Nationalism*, pp. 272 seq., *Imperial Conference*, ii. 94 seq.; Holland, *Imperium et Libertas*, pp. 265 seq.

[1] See *Parl. Pap.*, C. 4521. In 1911 Sir Joseph Ward developed while in Australia the doctrine that an Imperial Parliament should be created for Imperial purposes, leaving other matters to local legislatures. Australia seemed still lukewarm. Cf. Mr. Harcourt, *Canadian Gazette*, lviii. 227.

in *The Kingdom of Canada* and *The Kingdom Papers*,[1] lays stress on what appears to him the inevitable development of Canada as a kingdom united to Great Britain merely by the tie of a common Sovereign and by cordial goodwill. He insists that Canada is already entitled to that position, and he protests against the maintenance, even in theory, of the power of disallowance of Canadian Acts, of the supremacy of the Parliament of the United Kingdom, of the retention in the hands of the Imperial Government of the power of concluding even political and extradition treaties, and of the fact that the issues of war and peace lie in the hands of the Imperial Parliament. He justly recognizes that the powers of disallowance and of Imperial legislation are little used, and he insists on the fact that for all practical purposes, though technically Canada is at war with any power with which the Mother Country is at war, nevertheless it rests with Canada to determine whether she will take any active part in such war, and that if Canada chooses to remain neutral no power would be likely to attack it. It is interesting to compare with this view the proposal made in the first report of the Royal Commission on Federal Union in Victoria in 1870, which proposed that the right of treaty-making should be given to the Australian Colonies, and that the Imperial Government should secure for them a position as neutral states which would not be involved in war by the action of Great Britain through their being under the same Crown. That report never resulted in any action, and the public opinion of the day condemned the proposal as visionary, nor is it likely that Australia can ever obtain the same position of independence which Canada *de facto* now enjoys, in part no doubt owing to its vicinity to the United States and the protection of the Monroe doctrine.

Another consequence would follow from the recognition of the equality in all respects of the Dominions with the Mother Country, and one for which perhaps the Dominions

[1] He resents the fact that the title desired by Sir John Macdonald was given up in deference to American susceptibilities. For a curious argument from the name to the status of the Dominion, see 27 S. C. R. 461, at p. 492.

are not yet prepared. In Canada the question has not arisen of recent years as far as concerns the Dominion Government,[1] for the Dominion has been ruled by two strong parties, but the question has presented itself no less than thrice in the Commonwealth of Australia. The constitutional practice in the United Kingdom is undoubtedly that ministers shall receive a dissolution of Parliament whenever they ask for it, but no such practice prevails in the Dominions. If the Dominions were to be regarded as Kingdoms and their Governors were to be regarded as Viceroys—chosen where possible from the royal family, and reigning as constitutional monarchs—this distinction between the United Kingdom and the Dominions would certainly disappear, and there is no proof that it is yet desirable that the distinction should disappear or that it is desired that it should. In this connexion it is interesting to note that at the Imperial Conference of 1911[2] the New Zealand Government proposed that the High Commissioners should be given a new status, should be authorized to communicate directly with the Foreign Office, given seats on the Committee of Imperial Defence, and made the only channel of communication between the Home and the Dominion Governments. This proposal evidently implied that the Governors-General and Governors should not be used as at present, as a medium both of information to the Secretary of State and the Imperial Government, and for enforcing by their personal interposition in the form of explanation and discussion the views of the Imperial Government. Such a position of the High Commissioners would be appropriate if the Governor is to be regarded as a Viceroy and a constitutional monarch, but it would not be consistent with the position at present accorded to the Governor.

[1] Quite otherwise in the provinces, where dissolutions have been refused and Ministries dismissed on several occasions. The strong position of the Government in Canada renders an appointment such as that of the Duke of Connaught as Governor-General possible; it would be different if it were likely that political action were needed, for one so closely allied to the Crown must be beyond personal interference in government and such attacks as those on Lord Aberdeen in 1896.

[2] *Parl. Pap.*, Cd. 5513, p. 6; cf. C. 5091, pp. 555–8.

The difficulties of the position are illustrated also by the growing desire of the Dominions to be consulted in matters affecting war and peace. Thus complaint was made by the Commonwealth Government[1] that the Government of the Dominion had not been consulted with regard to the conclusion of the Declaration of London respecting naval warfare in 1909, and the ratification of the arrangement was, in accordance with their desire, held over until after discussion at the Conference of 1911. There is, therefore, evidence that closer communication and consultation will be essential in future.

In the same direction of course the events of 1899–1902 point very markedly. Prior to the Boer War expressions of opinion were given by certain of the Colonial Governments in favour of concessions by the Dutch Republics, and during the war spontaneous assistance was granted by Canada, Australia, and New Zealand, and of course by the Colonies in South Africa, who, however, were compelled to do so in any case in self-defence.[2] But the growing right of the Dominions to express opinions on Imperial questions was seen in the views to which they gave utterance as to the settlement after the war, and in particular to the objections of Australia, New Zealand, and the Cape to the adoption of the system of Chinese labour in the Transvaal.[3] From that objection Canada held aloof on the ground that it was an interference with the affairs of a Colony. But, on the other hand, Canada herself has on several occasions urged upon the Imperial Government the propriety of granting Home Rule to Ireland,[4] and there is a significant difference between the tones of the reply sent by Mr. Gladstone's instructions in

[1] *Parl. Pap.*, Cd. 5513, p. 9.

[2] Cf. Jebb, *Colonial Nationalism*, pp. 103–30; Canada *House of Commons Debates*, 1900, pp. 20 seq.; *Sess. Pap.*, 1900, No. 49; Willison, *Sir W. Laurier*, ii. 313 seq.; Ewart, *Kingdom of Canada*, pp. 169 seq.; *The State*, ii. 40 seq., 149 seq.; *The Round Table*, i. 231–62. See also Dalley, New South Wales *Parliamentary Debates*, xvi. 6 seq.; Parkes, *Fifty Years*, ii. 139–43. Cf. p. 1262.

[3] See New Zealand *Parl. Pap.*, 1905, A. 1, p. 6; 2 b; *Parl. Pap.*, Cd. 1895.

[4] See *Parl. Pap.*, Cd. 1697 (1903), 1943 (1904). So from Australia, Cd. 2821, 3187 (1906).

1882,[1] in which the Imperial Government assert that in matters affecting the United Kingdom Her Majesty must be advised by her ministers in that Kingdom, and the reply sent by the Government of 1903, though it did repeat the opinion of 1882, and a similar resolution from Australia in 1906 met with no criticism.

For the present at least it seems that consultation must be the mode in which the new relation of the Dominions and the United Kingdom is to be expressed, and the Imperial Conference with the subsidiary conferences offers the obvious mode of carrying out such consultations. It is much more doubtful whether any system of a permanent Council of advice such as that proposed by the Government of New Zealand at the Conference of 1911 is practicable, for there is the almost insuperable difficulty that a minister in a Dominion can only keep himself in touch with the current of opinion in the Dominion by residence there, and that a minister in London must be more or less completely out of harmony with the Government.[2] Moreover, in the Dominions the supremacy of Parliament over the Government is much more marked than in the case of the United Kingdom, where many factors concur in giving the Government a strong control over the members of Parliament.[3]

[1] Cf. Pope, *Sir John Macdonald*, ii. 228 seq.; C. 3294.

[2] See *Parl. Pap.*, Cd. 5745, pp. 92, 93, which decisively negatives the idea of the High Commissioners as a political council (Jebb, *Imperial Conference*, ii. 126–9). Sir C. Tupper's case is isolated; and technically even he was only a servant of the Governor in Council (*Rev. Stat.*, 1886, c. 16), though treated as a quasi-member of the Cabinet.

[3] Lowell in his *Government of England* rightly emphasizes this fact and salaries to members will strengthen the position. But it applies in a much less degree to the Colonies. The Labour Government in the Commonwealth is strong in 1911, but its policy is settled in caucus. Sir Wilfrid Laurier was strong, but deferred to Parliament far more than an English Prime Minister.

CHAPTER II

IMPERIAL CO-OPERATION

§ 1. The Colonial Conference of 1887

The first Colonial Conference properly so called was summoned by dispatch addressed to the Governors of Colonies under responsible government by Mr. Stanhope, the Secretary of State for the Colonies, on November 25, 1886.[1] In that dispatch he quoted the remarks in the Queen's speech on the prorogation of Parliament which referred to Her Colonial and Indian possessions in the following terms :—

> I have observed with much satisfaction the interest which, in an increasing degree, is evinced by the people of this country in the welfare of their Colonial and Indian fellow subjects ; and I am led to the conviction that there is on all sides a growing desire to draw closer in every practicable way the bonds which unite the various portions of the Empire. I have authorized communications to be entered into with the principal Colonial Governments with a view to the fuller consideration of matters of common interest.

He added that Her Majesty's Government had concurred that the Queen should be advised to summon a Colonial Conference in 1887 to discuss outstanding questions. He suggested that the most urgent question, and one brought to the front by the patriotic action of the Colonies in offering contingents of troops to take part in the Egyptian campaign, was that of the organization of military defence in the Empire ; and secondly, the promotion of commercial and social relations by the development of postal and telegraphic communication was, he thought, also of importance. But the dispatch deprecated the discussion of any of the subjects falling within the range of political federation. The Conference was to be purely consultative, and it was not material that the Colonies should have equal or proportionate repre-

[1] See *Parl. Pap.*, C. 5091, 5091 I, for proceedings and papers.

sentation, but that it rather should include, in addition to the Agent-General or other specially deputed representative of each Government, any leading public man who was in England at the time and was specially qualified to take a useful part in the discussion. At the same time, it was considered desirable to arrange for the presence of representatives from the Crown Colonies.

In response to this invitation a Conference was held which opened on April 4 and ended on May 9, 1887. The first meeting was a ceremonial one, when the Prime Minister and several other ministers and ex-ministers, Members of Parliament, and others, were present and general speeches were made by the Marquess of Salisbury, Lord Granville, Mr. Stanhope, Sir H. Holland, and representatives of the Colonies. Subsequently, when questions specially concerning particular departments were considered, members of the Government within whose department the question fell assisted in the discussions. Arrangements were made with the representatives of the Cape for the armament of Table Bay and for the fortification of Simon's Bay, the latter at the entire cost of the Imperial Government. It was not found possible to make any definite arrangements for the defence of King George's Sound and Torres Straits, but it was agreed to increase the Australasian squadron. The agreement was for ten years in the first instance, and under its terms five fast cruisers and two torpedo gunboats were to be added to the squadron under the command of the admiral, such vessels to be retained for service within the limits of the Australasian station, the Colonies agreeing to pay for maintenance a sum not exceeding £91,000 a year, and for depreciation and other incidental charges a further sum not exceeding £35,000 a year.

A scheme for Imperial penny postage was thought to be impracticable for financial reasons, and the Colonies were unwilling to enter the Postal Union without securing adequate representation.[1] The question of an alternative telegraphic

[1] This was afterwards arranged; cf. *Parl. Pap.*, C. 1666 (1877), 2050, 2309 (1878–9), 5040 (1887), for the discussion of the question.

line to Australia was discussed, but no decision was arrived at with regard to it. The position of the Pacific Islands was discussed at length, and though much divergence of opinion was manifested, it was agreed to preserve the neutrality of the New Hebrides under a joint Anglo-French Naval Commission. The settlement of the administration of British New Guinea was arranged, the Colony of Queensland together with the Colonies of New South Wales and Victoria engaging to defray the cost of administration to the extent of £15,000 a year for ten years, while the Imperial Government was to provide a suitable steam-vessel with the cost of its maintenance for three years at an estimated total cost of £29,000; and annexation followed in 1888.

Various questions in connexion with trade were debated, such as the adoption by the Colonies of similar legislation to that proposed in the Mother Country with regard to merchandize marks and patents, and the effect of foreign bounties upon the sugar trade of the Colonies. In regard to this last question, the representatives generally urged that in justice to Colonial industries and trade which were injuriously affected by the sugar bounties, Her Majesty's Government should spare no effort to bring about the abolition of that unsound system.[1]

Among the suggestions put forward was a proposal by Mr. Hofmeyr, a Cape representative, that commerce within the Empire should be encouraged by imposing a duty of an equal rate on all imports entering the Empire from foreign countries, and that the revenue thereby acquired should be applied to the defence of the Empire.

It was also urged that permission should be given to the self-governing Colonies to enter into direct negotiations with foreign Powers in regard to trade matters, as had been allowed in the case of Canada.[2]

Other questions discussed related to the enforcement of Colonial judgements and of orders in bankruptcy and winding

[1] This was effected later, see Cd. 1470, 1535, 1632 (1903).

[2] This was not quite accurate: Canada had negotiated through Great Britain. Cf. Part V, ch. v; Jebb, *Imperial Conference*, i. 171, 172, 379–82.

up of companies, and the question was raised as to the best method of giving effect to Colonial wills.[1] There were also raised the questions of the investment of trust funds in Colonial stock,[2] stamp duties on the transfer of Colonial inscribed stock, a question on which some concession was made, the position of unclaimed dividends on Colonial stock, and questions as to dissolution and pardon which are noticed above.

It was also considered whether the title of the Crown should not be changed so as to include a reference to the Colonies, but on reference to the Colonial Governments it was ascertained that there was no strong desire for this.[3]

Another subject which was raised was the question of the marriage of a deceased wife's sister, but no result was arrived at then. In 1907, however, the matter was settled by the passing of the Imperial Act.

§ 2. The Colonial Conference of 1894

The next Colonial Conference—that of Ottawa in 1894—arose in the main out of proposals made in 1887 as to the laying of a cable to connect Australasia and Canada, and was hardly a full Colonial Conference. The invitation to the Conference was issued by the Canadian Government and not by the Colonial Office. There were present representatives of the Dominion of Canada, the Governments of New South Wales, Tasmania, South Australia, Victoria, Queensland, New Zealand, and the Cape of Good Hope, and Lord Jersey represented Her Majesty's Government. The representation of the Cape gave much gratification, as the question of the cable had not specially referred to the Cape. The resolutions passed included the following: 'That provision should be made by Imperial legislation enabling the dependencies of the Empire to enter into agreements of commercial reciprocity, including power of making differential tariffs, with Great Britain or with one another.' Secondly, 'That any

[1] See the *Colonial Probates Act*, 1892 (55 Vict. c. 6).

[2] Arranged in 1900; see *Parl. Pap.*, H. L. 189, 1877; C. 6278 (1890–1); H. L. 169, 1892; H. C. 276, 1893; H. C. 300, 1900.

[3] It was altered in 1901; see Cd. 708; 1 Edw. VII. c. 15.

provisions in existing treaties between Great Britain and any foreign Power which prevent the self-governing dependencies of the Empire from entering into agreements of commercial reciprocity with each other or with Great Britain should be removed.' The Conference also passed a resolution in favour of Imperial preference, and pending the time when the United Kingdom would adopt this plan, they recommended that the Colonies should take steps to grant intercolonial preference. Their recommendations were due to the existing restrictions on the Australasian Colonies under which they were not permitted to enter into differential tariff agreements, except, under the Act of 1873,[1] with the adjoining Australian Colonies. The treaties of which it was desired to secure a repeal were those with Belgium of 1862 and with the German Zollverein of 1865, which precluded the grant by the Colonies of preferential treatment to the United Kingdom.

Recommendations were made in favour of a fast Atlantic and a fast Pacific service between Vancouver and Sydney, and for the formation of a Pacific cable to connect Canada and Australasia with, if possible, a neutral landing-ground on one of the Hawaiian Islands.[2]

The Imperial Government replied to the recommendations of this Conference in dispatches of June 28, 1895,[3] which expressed the final decision which has been arrived at with regard to the various points of importance discussed at the Conference. The first of the dispatches from Lord Ripon explained at length the reasons why Her Majesty's Government could not undertake the arrangements for a preferential tariff. On the other hand, it was recognized that the agreement for reciprocal treatment between two Colonies stood on a different footing and might be accepted, but nevertheless, as such arrangements might injuriously affect the

[1] 36 & 37 Vict. c. 22. See Part V, chap. vi.

[2] See *Parl. Pap.*, C. 7553, 7632, 7824. For the cable, see Ewart, *Kingdom of Canada*, pp. 275–88. Hawaii was found impossible, because the United States annexed the islands; Canada *Sess. Pap.*, 1900, No. 55–55 b.

[3] C. 7824; this was one of the last acts of Lord Ripon as Secretary of State. Cf. Jebb, *Imperial Conference*, i. 159–93, 232–42.

Mother Country or sister Colonies, they would require to receive careful consideration before they could be approved. Her Majesty's Government, however, had decided to meet the views of the Australian Colonies and repeal the existing prohibitions with regard to differential duties, but any Bill which might be passed under the power so conferred would require to be reserved for the signification of the royal pleasure. Any Act, however, giving such preference should not give a discretion to an Executive Government as to the application of the preference, but should contain in itself the terms which it was proposed to grant.

On the other hand, the Imperial Government were not yet prepared to denounce the treaties with Belgium and Germany; these treaties did not prohibit the Imperial Government from granting preferential treatment to the Colonies nor inter-colonial preference; they only prevented a preference being granted by the Colonies to the Imperial Government, and the Imperial Government did not think the advantage of the preference would outweigh the loss to the trade of the two countries, worth then £41,000,000, for though a new treaty might be negotiated it would be difficult to secure satisfactory terms.

The second dispatch dealt with the question of commercial negotiations with foreign Powers, and laid down the principles that all such negotiations must be conducted through Her Majesty's representative; that any agreement must receive before signature the consent of Her Majesty's Government, and that every concession granted to a foreign Power must be automatically extended to the United Kingdom and to all other British possessions, and that no concession should be made to or asked from a foreign Power which would injuriously affect British interests.

§ 3. The Colonial Conference of 1897

The next Colonial Conference was held in 1897 on the invitation of the Imperial Government, and took place in connexion with the celebration of the sixtieth anniversary of Her Majesty's succession. All the self-governing Colonies

were represented, the Prime Ministers of Canada, New South Wales, Victoria, New Zealand, Queensland, Cape Colony, South Australia, Newfoundland, Tasmania, Western Australia, and Natal being present. The proceedings of this Conference were not published, but merely the speech with which it was opened by the President—Mr. Chamberlain—and the actual resolutions as passed by the Conference.[1] The resolutions on trade were as follows :—

That the Premiers of the self-governing Colonies unanimously and earnestly recommend the denunciation, at the earliest convenient time, of any treaties which now hamper the commercial relations between Great Britain and her Colonies.

That in the hope of improving the trade relations between the Mother Country and the Colonies the Premiers present undertake to confer with their colleagues with the view to seeing whether such a result can be properly secured by a preference given by the Colonies to the products of the United Kingdom.[2]

In accordance with these resolutions steps were taken to notify to Germany and Belgium their desire to denounce their existing commercial treaties, which therefore ceased with effect from July 30, 1898.[3]

On the question of political relations the resolutions passed expressed general satisfaction as to the political relations between the United Kingdom and the self-governing Colonies, and the opinion that it was desirable where practicable to unite in a federal union Colonies which were geographically united. The Prime Ministers also all considered that it would be desirable to hold periodical Conferences of representatives of the Colonies and Great Britain for the discussion of matters of common interest. Mr. Seddon for New Zealand, and Sir E. Braddon for Tasmania, were of opinion that the time had already come that an effort should be made to

[1] See *Parl. Pap.*, C. 8596; Jebb, *Imperial Conference*, i. 289–336.

[2] Canada granted a 25 per cent. British preference in 1898; see 60 & 61 Vict. c. 16; 61 Vict. c. 37; 63 & 64 Vict. c. 15; *Parl. Pap.*, Cd. 1299, p. 118; 3524, pp. 317 seq.

[3] See *Parl. Pap.*, C. 9423; Cd. 1630, and for German retaliation on Canada, Cd. 1781.

render more formal the political ties between the United Kingdom and the Colonies. The majority of the Premiers were not yet prepared to adopt this position, but there was a strong feeling amongst some of them that with the rapid growth of population in the Colonies the present relations could not continue indefinitely, and that some means would have to be devised for giving the Colonies a voice in the control and direction of those questions of Imperial interest in which they were concerned equally with the Mother Country.

It was recognized at the same time that such a share in the direction of Imperial policy would involve a proportionate contribution in aid of Imperial expenditure, for which at present, at any rate, the Colonies generally were not prepared.

The question of the Treaty of 1894 with Japan was brought before the Conference, but, with the exception of Queensland, Newfoundland, and Natal, the Premiers declared that they were not prepared to abandon their former attitude with regard to the treaty, to which they did not desire to adhere.[1] They also, with the exception of the Premier of Newfoundland, stated that they did not wish the Colonies they represented to become parties to the convention in regard to trade with Tunis then being negotiated with France.

On the question of the legislative measures which had been passed by various Colonies for the exclusion of coloured immigrants a full exchange of views took place, and though no definite agreement was reached at the meeting, as the Premiers desired to consult their colleagues and Parliaments on the subject, it was announced that Her Majesty's Government had every expectation that the natural desire of the Colonies to protect themselves against an overwhelming influx of Asiatics could be attained without placing a stigma upon any of Her Majesty's subjects on the sole ground of race and colour.

With regard to postal communications within the Empire, it appeared that in the present financial circumstances of

[1] Canada adhered under a special protocol in 1906 (*Parl. Pap.*, Cd. 3157), and the adherence of Queensland arranged in 1897 was denounced for the Commonwealth Government in 1908; above, p. 1084.

the Colonies an Imperial penny post was impracticable, although the Prime Ministers of the Cape Colony and Natal declared themselves in favour of such a step, and expressed their belief that the Legislatures of their Colonies would be prepared to give effect to it.[1]

The question of the proposed Pacific cable was brought up, but the majority of the Premiers desired that the subject should be deferred until they had had time to consider the report of the Committee appointed to consider the question last year.[2] It was, however, pointed out to the members of the Conference that the matter was not one in which the United Kingdom was taking the initiative, although Her Majesty's Government were ready to consider any proposal for working with and assisting the Colonies if they attached great importance to the project; and that they would now await definite proposals from the Colonies interested before proceeding further in the matter.

At the last meeting of the Conference a resolution was passed unanimously by those of the Premiers who were still present, to the following effect :—

Those assembled are of the opinion that the time has arrived when all restriction which prevents investments of trust funds in Colonial stock should be removed.

The question of Imperial defence was also discussed at length. The First Lord of the Admiralty made a statement in which he asserted his appreciation of the maintenance of the existing agreement with regard to the Australasian flotilla. He also pressed the importance of the Admiralty being given a free hand in the disposition of the fleet, so that they should be in a position to conduct the defence of Australia on the same principles as were followed in the defence of the United Kingdom. He assured the delegates that there was no question of removing the squadron from Australian waters, or exposing Australia to be attacked by foreign

[1] A Postal Conference in June–July 1898 established penny postage in that year.

[2] The cable was ultimately agreed upon, and the laying began in 1902; see *Parl. Pap.*, C. 7553, 7632, 9247, 9283; Cd. 46, 2663.

Powers. The only freedom which the Admiralty desired was freedom so as best to protect Australia, not as best to protect other parts of the Empire. The Conference, after hearing Mr. Goschen, held that the statement of the First Lord of the Admiralty with reference to the Australian squadron was most satisfactory, and the Premiers of Australasia favoured the continuance of the Australian squadron under the terms of the existing agreement. All the Australian Premiers except Mr. Kingston supported the resolution, and he declined to vote pending further consideration of a scheme which he put before the Conference for the establishment of a branch of the Royal Naval Reserve in Australia. The Premier of the Cape announced that in pursuance of the resolution passed by the Legislature of that Colony in favour of a contribution towards the navy, he was prepared to offer, on behalf of the Colony, an unconditional contribution of the cost of a first-class battleship, an offer later changed into an annual contribution of £30,000, to which Natal added £12,000 a year.

Various minor matters were discussed, and the Secretary of the Colonial Defence Committee pointed out to the various Colonial Premiers the steps which were required, in the opinion of the Committee, to complete preparations for any emergency. The Premiers undertook to consider the views expressed by the Committee, and it was also agreed to consider the suggestion made for an occasional interchange of military units between the Mother Country and the Colonies.

§ 4. The Colonial Conference of 1902

The next Colonial Conference was held in 1902 on the occasion of His Majesty's Coronation.[1] The subjects indicated in the invitation to the delegates—in this case the Prime Ministers[2]—were the political and commercial relations of the Empire and its naval and military defence, but the Colonies were asked to make suggestions of other subjects. As in the case of 1897 the proceedings were treated as confi-

[1] See *Parl. Pap.*, Cd. 1299; Jebb, *Imperial Conference*, i. 339–77.

[2] Canadian and Australian ministers also attended on their special topics only.

dential, and there was laid before Parliament only the speech made by Mr. Chamberlain at the opening of the Conference, certain papers submitted to the Conference, and the resolutions at which the Conference arrived. The most important of the resolutions were as follows : With regard to political relations it was resolved—

That it would be to the advantage of the Empire if Conferences were held, as far as practicable, at intervals not exceeding four years, at which questions of common interest affecting the relations of the Mother Country and His Majesty's Dominions over the seas could be discussed and considered as between the Secretary of State for the Colonies and the Prime Ministers of the self-governing Colonies. The Secretary of State for the Colonies is requested to arrange for such Conferences after communication with the Prime Ministers of the respective Colonies. In case of any emergency arising upon which a special Conference may have been deemed necessary, the next ordinary Conference to be held not sooner than three years thereafter.

It was also resolved that, as far as might be consistent with the confidential negotiation of treaties with foreign Powers, the views of the Colonies affected should be obtained, in order that they might be in a better position to give their adhesion to such treaties.

With regard to naval defence, it was agreed by Australia to increase its contribution to £200,000 a year in return for the improvement of the squadron and the establishment of a branch of the Royal Naval Reserve. The contribution of New Zealand was increased to £40,000 for the same purpose, while the Cape Colony agreed to give £50,000 a year and Natal £35,000 a year towards the general maintenance of the navy, while Newfoundland consented to contribute £3,000 a year and a capital sum of £1,800 for fitting up and preparing a drill ship towards the maintenance of a branch of the Royal Naval Reserve of not less than 600 men. It was also agreed that the naval and military authorities should afford greater facilities in the grants of commissions in the army and cadetships in the navy to young colonials, and this was accordingly done.

The Conference also asserted the principle of preferential trade. They recognized that free trade between the Mother Country and the British Dominions beyond the seas was not practicable at the present moment, but that the Colonies should grant preference to the Mother Country, and that His Majesty's Government should be urged to consider the expediency of granting preferential treatment to the products and the manufactures of the Colonies. Canada undertook to continue its preference of 33⅓ per cent. and to increase it; New Zealand promised a preference of 10 per cent.; the Cape and Natal a general preference of 25 per cent., and Australia an undefined general preference.[1]

On the same principle it was agreed that it was desirable that in Government contracts, whether Colonial or Imperial, the products of the Empire should be preferred to those of foreign countries.

The attention of the Governments was to be called to the navigation laws of the Empire and in other countries, and to the advisability of refusing the privileges of coastwise trade, including in that term trade between the United Kingdom and the Colonies and between one Colony and another, to countries in which the corresponding trade was confined to national vessels, and it was also recommended that it should be considered whether any other steps should be taken to promote Imperial trade in British vessels.

The other recommendations were of a minor character, in favour of the adoption of the metric system of weights and measures, the mutual protection of patents, the right of purchasing cables, and the establishment of cheap postage on newspapers and periodicals.[2]

[1] These promises were made good in the next tariff legislation of all these Colonies. Cf. Jebb, *Colonial Nationalism*, pp. 214–40; *Parl. Pap.*, Cd. 2326; H. C. 310, 1903 (Canada); Cd. 1599, 1640 (1903); 2977 (1906). For an analysis of the preferences and full details, see Cd. 3524, pp. 317 seq.

[2] Carried into effect by an arrangement with Canada in 1906 (Ewart, *Kingdom of Canada*, pp. 289–97), since extended to Newfoundland.

§ 5. The Proposals for an Imperial Council

In a dispatch of April 20, 1905,[1] Mr. Lyttelton made certain proposals to the Governors of the self-governing Colonies. He summarized in that dispatch the history of previous Imperial Conferences, and suggested that it would be desirable to discard the title of ' Colonial Conferences ' and to speak of the meetings as meetings of the ' Imperial Council '.

It was suggested that His Majesty's Government should be represented at these meetings by the Secretary of State for the Colonies. India, whenever her interests required it, would also be represented. The other members of the Council would be the Prime Ministers of the Colonies represented at the Conference of 1902, or, if any Prime Ministers should be unable to attend, representatives appointed for that purpose by their Governments. These persons would constitute the permanent body of the Imperial Council, but, as in 1902, their consultations could be assisted when necessary for special purposes by other ministers belonging either to the Imperial or to the Colonial Governments. They did not desire to give the Council by any instrument a more formal character, to define its constitution more closely, or to attempt to delimit its functions. History showed that such an institution might be wisely left to develop in accordance with the circumstances, and as it were of its own accord, and it was well not to sacrifice elasticity of power of adaptation to premature definiteness of form.

It was also suggested that matters should be prepared in advance for the meeting of the Conference by a body on which all the Prime Ministers of the Colonies should be represented.

In questions of defence this work was already done by the Imperial Defence Committee, on which also His Majesty's Government desired to obtain from time to time the presence of Colonial representatives, and it was proposed to establish a similar body to deal with matters of a civil character. Such a body would also be useful, as the Imperial Council could refer questions to it for subsequent examination and report.

[1] *Parl. Pap.*, Cd. 2785. Cf. Ewart, *Kingdom of Canada*, pp. 217–24.

At present the resolutions of the Conferences were left to be carried out in such manner as the Governments concerned thought fit, and a permanent commission would serve a useful purpose in preparing matters for the Conference and examining matters referred to it by the Conference. Moreover, such a permanent body would avoid the necessity of having Conferences *ad hoc,* which took a long time to bring together. It was, therefore, suggested for consideration that His Majesty should be advised to appoint a commission of a more permanent kind to discharge, in respect to matters of joint concern, the same functions as both in the United Kingdom and the Colonies were wont to be discharged by royal commissions or departmental committees. The commission would only act upon references made either by the Imperial Council at its meetings or at any time by His Majesty's Government together with one or more of the Colonial Governments. Its functions would be of a purely consultative and advisory character, and would not supersede but supplement those of the Colonial Office. The Commission might be constituted at first for a term of years, and then, if it were found to be useful and successful, it could be renewed. The Commission would, it was proposed, consist of a permanent nucleus of members nominated, in a certain proportion, by His Majesty's Government and the Colonial Governments, but there should be power to the Commission to obtain the appointment of additional members, when necessary, for the purpose of making special inquiries. The persons appointed by the several Governments to be permanent members of the Commission would, no doubt, be men of business or of official experience, and their remuneration would rest with the Governments which they respectively represented.

The Commission should have an office in London, as the most convenient centre, and an adequate secretarial staff, the cost of which His Majesty's Government would be willing to defray. It would probably be convenient that the Secretary of the Commission should also act as Secretary to the Imperial Council when it met. He would be responsible

for keeping all records both of the Council and the Commission.

The proposals made both as to title and the permanent Commission were welcomed by the Governments of the Cape and Natal. The Government of Australia also concurred both in the proposed formation of an Imperial Council and a permanent Commission, and on such a Commission they considered that the Government of Australia should be allowed two representatives at least, one of whom should be the High Commissioner when appointed, or his substitute.

The Government of Newfoundland were not convinced that the time had yet come to carry out the proposals suggested in Mr. Lyttelton's dispatch. They were inclined to think that such an Imperial Council would necessarily acquire or possess a certain degree of executive authority, and Newfoundland was not in a position to take any positive steps either to contribute towards the cost of the defence of the Empire as a whole, or to give a preference in commercial matters, a reference to the Hay–Bond Convention of 1902.

The Government of New Zealand were not able to reply, and the Government of Canada, in a reasoned minute of November 13, 1905, were somewhat adverse to the scheme.

The remarks of the Canadian Government were as follows [1]:—

The Committee at the outset are disposed to consider that any change in the title or status of the Colonial Conference should rather originate with, and emanate from, that body itself. At the same time, being fully alive to the desire of His Majesty's Government to draw closer the ties uniting the Colonies with each other and with the Motherland, they are prepared to give the proposals referred to their respectful consideration, and having done so, beg leave to offer the following observations :—

Your excellency's advisers are entirely at one with His Majesty's Government in believing that political institutions 'may often be wisely left to develop in accordance with circumstances and, as it were, of their own accord', and it is for this reason that they entertain with some doubt the proposal to change the name of the Colonial Conference to

[1] *Parl. Pap.*, Cd. 2785, p. 14; Jebb, op. cit., ii. 7–24.

that of the Imperial Council, which they apprehend would be interpreted as marking a step distinctly in advance of the position hitherto attained in the discussion of the relations between the Mother Country and the Colonies. As the Committee understand the phrase, a Conference is a more or less unconventional gathering for informal discussion of public questions, continued, it may be, from time to time, as circumstances external to itself may render expedient, but possessing no faculty or power of binding action. The assembly of Colonial ministers which met in 1887, 1897, and 1902 appear to the Committee to fulfil these conditions. The term Council, on the other hand, indicates, in the view of your Excellency's ministers, a more formal assemblage, possessing an advisory and deliberative character, and in conjunction with the word 'Imperial' suggesting a permanent institution which, endowed with a continuous life, might eventually come to be regarded as an encroachment upon the full measure of autonomous legislative and administrative power now enjoyed by all the self-governing Colonies.

The Committee, while not wishing to be understood as advocating any such change at the present time, incline to the opinion that the title 'Imperial Conference' might be less open to the objections they have indicated than the designation proposed by His Majesty's Government.

As regards the second suggestion of His Majesty's Government, the Committee are sensible that such a Commission would greatly facilitate the work of the Conference, and at the same time enhance the dignity and importance of that assembly. They cannot, however, wholly divest themselves of the idea that such a Commission might conceivably interfere with the working of responsible government. While for this reason the Committee would not at present be prepared to adopt the proposal for the appointment of a permanent Commission, they feel that such a proposal emanating from His Majesty's Government should be very fully inquired into, and the Canadian representatives at the next Conference, whenever it may be held, would be ready to join the representatives of the sister Colonies in giving the whole matter their most careful consideration.

The Secretary of State in view of this minute decided to let matters stand over for discussion at the next Conference, which was fixed for 1907, as it was found impossible conveniently to arrange an earlier date. The Government of

which Mr. Lyttelton was a member fell in 1905, and Lord Elgin, his successor, did not endorse his proposals, but left them for free discussion at the Conference which met in 1907.[1]

§ 6. The Colonial Conference of 1907

Before the Colonial Conference of 1907 was held, the Canadian Government raised the question as to the mode in which that Government should be represented at the Conference.[2] It was represented that it would be convenient if not merely the Prime Minister should be invited to attend, but also other ministers, and it was pointed out that in 1902 other ministers as a matter of fact had attended and taken part in the deliberations. The Secretary of State, while declining to make any change in the formal constitution of the Conference, which he left for consideration of the Conference itself, concurred in the desirability of the presence of other ministers besides the Prime Minister, and such ministers attended the Conference on the understanding that the voting should be by Colonies and not by individual heads.

The Conference of 1907 was the first Conference to be held without being specially connected with some ceremonial event in the Empire. It differed also from the Conferences of 1897 and 1902 in the fact that the proceedings, with certain exceptions, were published and laid before Parliament.[3] The resolutions passed were of peculiar importance. In the first place the Constitution of the Imperial Conference was definitely laid down in the following terms[4]:—

That it will be to the advantage of the Empire if a Conference, to be called the Imperial Conference, is held every four years, at which questions of common interest may be discussed and considered as between His Majesty's Government and the Governments of the self-governing Dominions

[1] See *Parl. Pap.*, Cd. 2975.

[2] See *Parl. Pap.*, Cd. 3340.

[3] See *Parl. Pap.*, Cd. 3523 (Proceedings), 3524 (Papers); Jebb, op. cit., ii.

[4] Mr Lyttelton's suggestion of an Imperial Council was discussed and not accepted, Canada fearing that the institution of such a body might have an injurious effect on Dominion autonomy; see Cd. 3523, pp. 26-94.

beyond the seas. The Prime Minister of the United Kingdom will be *ex officio* President, and the Prime Ministers of the self-governing Dominions *ex officio* members, of the Conference. The Secretary of State for the Colonies will be an *ex officio* member of the Conference, and will take the chair in the absence of the President. He will arrange for such Imperial Conferences after communication with the Prime Ministers of the respective Dominions.

Such other ministers as the respective Governments may appoint will also be members of the Conference, it being understood that, except by special permission of the Conference, each discussion will be conducted by not more than two representatives from each Government, and that each Government will have only one vote.

That it is desirable to establish a system by which the several Governments represented shall be kept informed during the periods between the Conferences in regard to matters which have been or may be subjects for discussion, by means of a permanent secretarial staff, charged, under the direction of the Secretary of State for the Colonies, with the duty of obtaining information for the use of the Conference, of attending to its resolutions, and of conducting correspondence on matters relating to its affairs.[1]

That upon matters of importance requiring consultation between two or more Governments which cannot conveniently be postponed until the next Conference, or involving subjects of a minor character or such as call for detailed consideration, subsidiary Conferences[2] should be held between representatives of the Governments concerned specially chosen for the purpose.

Military matters were dealt with by the adoption of the principle of the establishment of a General Staff for the Empire, which should study military science in all its branches, should collect and disseminate to the various Governments military information and intelligence, should undertake the preparation of schemes of defence on a common principle and, while not interfering with questions of command and administration, should at the request of the respective Governments

[1] This was carried into effect by a reorganization of the Colonial Office in 1908; see *Parl. Pap.*, Cd. 3795; 5273, pp. 1–12.

[2] Under this clause a Naval and Military Conference was held in 1909 (*Parl. Pap.*, Cd. 4948), and a Copyright Conference in 1910 (*Parl. Pap.*, Cd. 5272). Cf. the Surveyors' Conference of 1911; Cd. 5776.

advise as to the training, education, and war organization of the military forces of the Crown in every part of the Empire. It was also agreed that the Committee of Imperial Defence should undertake to advise on any local questions in regard to which expert assistance was deemed desirable, and whenever so desired a representative of any Colony which might ask for advice should be summoned to attend as a member of the Committee during the discussion of the questions raised.[1]

The question of judicial appeals[2] was discussed at great length, but it was not found possible by the Imperial Government to accept the resolution of the Commonwealth of Australia in favour of the establishment of one Imperial Court of Appeal. It was agreed, however, that the practice and procedure of the Judicial Committee of the Privy Council should be laid down in the form of a code of rules and regulations, and simplified so as to control expense and minimize delays, while as far as possible the conditions on which appeals were permitted should be made equal, and some portion of His Majesty's prerogative to grant special leave to appeal in cases where there existed no right of appeal should be delegated to the Courts of the Colonies. It was also agreed, on the motion of General Botha, that when Colonies were federated or a Court of Appeal was established for a group of Colonies geographically connected, it should be competent for the Legislatures of those Colonies to abolish any existing right of appeal from the Supreme Courts to the Judicial Committee of the Privy Council; that the decision of such a Court of Appeal should be final subject to the right of the Court to grant leave to appeal in such cases as might be laid down by the statutes under which it was established, but that the right to appeal by special leave from the Privy Council should not be curtailed.[3]

[1] See *Parl. Pap.*, Cd. 3523, pp. 94–120, 123–8. Minor questions as to arms and ammunition, exchange of officers, cadets, military schools, and rifle clubs were discussed. [2] Ibid., pp. 200–26.

[3] This was embodied in the *South Africa Act*, 1909 (9 Edw. VII. c. 9). See Part VI, chap. iii; *Parl. Pap.*, Cd. 5745, p. 230.

The Conference, with the exception of His Majesty's Government, reaffirmed the resolutions of the Conference of 1902 as to preferential trade,[1] while His Majesty's Government concurred in resolutions in favour of supporting British manufactured goods and British shipping. His Majesty's Government, however, were only able to concur in the reaffirmation of the resolutions of the Conference of 1902 as to coastwise trade, subject to the omission of the words dealing with trade between the Mother Country and the Colonies.

The Conference agreed that inquiry should be instituted as to how far it was possible to make the privileges conferred and obligations imposed upon the Colonies by existing commercial treaties uniform throughout the Empire, and that all doubt should be removed as to the right of the Dominions to make reciprocal and preferential fiscal agreements with each other and with the United Kingdom.[2]

Resolutions were passed in favour of uniformity as regards trade marks and patents, trade statistics, and company law, and in favour of the establishment of reciprocity throughout the Empire with regard to the examination and authorization of land surveyors.[3] It was also recommended that international penny postage should be aimed at and that landing licences for cables should be restricted to twenty years, and that subsidies should only be paid on the principle that half the receipts, after a fixed gross revenue had been earned, should be utilized for the extinguishment of the subsidy, and, by agreement, for reduction of the rates.

It was also agreed to consider on what conditions naturalization[4] in one Dominion should be made effective in other parts of the Dominions, a subsidiary Conference to be held if necessary, and that if possible a service for mail, travel, and transport purposes should be devised for connecting Great

[1] *Parl. Pap.*, Cd. 3523, pp. 33 seq., 228 seq., 432 seq.

[2] *Parl. Pap.*, Cd. 3523, p. 468. It does not seem that there is any real room for doubt as to this matter. No treaty prevents inter-Imperial or inter-Colonial preferences. Cf. *Parl. Pap.*, Cd. 3395, 3396, 4080.

[3] A Conference on this was held in London in May 1911 ; see *Parl. Pap.*, Cd. 5273, pp. 124–35; 5776.

[4] *Parl. Pap.*, Cd. 3523, pp. 178–82, 533–41 ; 3524, pp. 92–160.

Britain with Canada, and through Canada with Australia and New Zealand.[1]

In 1909 the first subsidiary Conference under the resolution of the Conference of 1907 was held to deal with the question of military and naval defence. The conclusions resulted in the decision of Australia and Canada to establish auxiliary fleets, and of New Zealand to contribute a cruiser, besides a subsidy of £100,000 a year to a squadron of the new Pacific fleet, to be composed of three units, one in Indian waters, one in New Zealand and China seas, and one in Australian waters.[2]

[1] Naturalization was more successfully discussed at the Imperial Conference of 1911, and the 'All-Red Route' scheme has so far not eventuated in any practical result; see Jebb, op. cit., ii. 339–64; below, chap. iii, § 4.

[2] See Part V, chap. x; *Parl. Pap.*, Cd. 5135, pp. 3, 4; 5582, p. 18.

CHAPTER III

THE CONFERENCE OF 1911

§ 1. The Preparations for the Conference

Much more effective steps were taken than in 1902 to carry out the decisions of the Colonial Conference.

In accordance with the agreement arrived at at the Defence Conference of 1909, the Commonwealth of Australia placed orders through the Admiralty for the cruisers required, Canada purchased the *Rainbow* and *Niobe*, and proposed to place further orders for four cruisers and six destroyers to be built in Canada; orders were also placed for the cruiser to be given by New Zealand, and in Canada and Australia Naval Defence Acts were passed under which the new defence forces are governed by principles similar to those in force in the Imperial Navy.[1]

In 1910 a Subsidiary Imperial Conference was convened to consider the subject of Imperial copyright.[2] The Conference was held in May and June, and discussed fully the questions of the maintenance of the unity of copyright legislation throughout the Empire, and the desirability of the Empire accepting the Revised Copyright Convention of Berlin (1908). The Governments of all the Dominions were represented, and important resolutions were passed in favour of the adoption of a uniform copyright law for the Empire, and in favour of the acceptance of the Revised Copyright Convention, subject to certain reservations, and in particular to the right of any self-governing Dominion to limit the obligation imposed by the Convention to works the authors

[1] For the correspondence arising out of the Conference of 1907 up to July 1910, see *Parl. Pap.*, Cd. 5273. Full recognition of the work of the secretariat under Sir H. Just was accorded by all the Prime Ministers who attended the Conference.

[2] See *Parl. Pap.*, Cd. 5272; Part V, chap. viii.

of which are subjects or citizens of a country of the union, or bona fide residents in such a country.

Steps were taken in accordance with the fifth resolution of the Conference to pass new Orders in Council respecting appeals from the Supreme Courts of New Zealand, the six Australian states, the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, British Columbia, Alberta, and Saskatchewan, while Orders in Council respecting procedure were passed in respect of the Commonwealth of Australia and the Union of South Africa.[1]

In accordance with the wishes of the Conference of 1907, steps were taken for the appointment of Trade Commissioners in the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, and a paid correspondent of the Board of Trade was appointed in Newfoundland. These officers perform with regard to matters of trade much the same functions as are performed by His Majesty's consuls in foreign countries.[2]

Steps were taken to secure greater uniformity in the laws of the Dominions with regard to trade marks and patents.[3] Moreover, the trade statistics of the Dominions were modified with a view to showing more clearly the trade with the United Kingdom, British possessions, and foreign countries.[4]

Uniformity in company law[5] was in part effected by legislation in the Transvaal in 1909 (No. 31), in Victoria in 1910 (No. 2293), and in British Columbia in 1910 (c. 7). Moreover, the Imperial legislation was consolidated in 1908, the New Zealand in the same year, and the Dominion Governments have under consideration the question of assimilating their legislation to that Act.[6] Arrangements were made to hold a subsidiary conference with regard to reciprocity in the examination and authorization of surveyors throughout

[1] *Parl. Pap.*, Cd. 5273, pp. 26–41. [2] Ibid., pp. 43–60; 4917.
[3] Ibid., pp. 66–85. [4] Ibid., pp. 86–113. [5] Ibid., pp. 113–24.
[6] The Commonwealth has under the Constitution of 1910 no general legislative powers regarding companies. The referendum of April 26, 1911, proposed to take such powers, but it was rejected (above, Part IV, chap. ii).

the Empire, at which the Dominion of Canada, the Commonwealth of Australia, and all the states (except South Australia) and New Zealand were represented.[1]

The question of naturalization was considered by an Interdepartmental Committee in 1908. Its report was forwarded for the consideration of the Dominions, and further discussion was arranged for at the Imperial Conference of 1911.[2]

Steps were taken for the introduction of a silver currency in the Commonwealth of Australia, and by an Order in Council of January 23, 1911, the operation of the Imperial Act of 1870 was revoked so far as the Commonwealth is concerned. The coinage is still manufactured at the Royal Mint.[3]

The Radiotelegraphic Convention of 1906 was adhered to by the Dominion of Canada, the Union of South Africa, the Commonwealth of Australia, and the Dominion of New Zealand.[4] A Bill was prepared for introduction into the Imperial Parliament with a view to facilitating marriages [5] in this country of persons coming from British Dominions and Colonies.

Steps were taken to secure a reduction in the Suez Canal dues by 50 centimes a ton from January 1, 1911.

§ 2. The Agenda of the Conference

The Agenda for the Conference of 1911 presents the usual feature of no resolution being moved by Canada, though in the House of Commons there was a suggestion that the Premier should raise the question of the status of consuls, which has caused trouble in the Dominion. Newfoundland only proposed the question of a steamship line direct to Newfoundland and Canada, no doubt as a link in the red route scheme. New Zealand, on the other hand, proposed many important questions, the list of which is as follows :—[6]

1. *Publication of proceedings.*

That the Conference be open to the press, except when the subjects are confidential.

[1] *Parl. Pap.*, Cd. 5273, pp. 124–34; 5776. [2] Ibid., pp. 138–57.
[3] Ibid., pp. 158–63; above, p. 1186. [4] Ibid., pp. 169–78.
[5] Ibid., pp. 179–219. [6] *Parl. Pap.*, Cd. 5513, pp. 6, 7.

2. *Imperial representation of oversea Dominions with a view to furthering Imperial sentiment, solidarity, and interest.*

That the Empire has now reached a stage of Imperial development which renders it expedient that there should be an Imperial Council of State, with representatives from all the constituent parts of the Empire, whether self-governing or not, in theory and in fact advisory to the Imperial Government on all questions affecting the interests of His Majesty's Dominions oversea.

3. *Reconstitution of the Colonial Office, &c. :*

(1) That it is essential that the Department of the Dominions be separated from that of the Crown Colonies, and that each Department be placed under a separate Permanent Under-Secretary.

(2) That in order to give due effect to modern Imperial development it has now become advisable to change the title of Secretary of State for the Colonies to that of ' Secretary of State for Imperial Affairs '.

(3) That the staff of the Secretariat be incorporated with the Dominions Department under the new Under-Secretary, and that all questions relating to the self-governing Dominions be referred to that Department ; the High Commissioners to be informed of matters affecting the Dominions with a view to their Governments expressing their opinion on the same.

(4) That the High Commissioners be invited to attend meetings of the Committee of Defence when questions on Naval or Military Imperial defence affecting the oversea Dominions are under discussion.

(5) That the High Commissioners be invited to consult with the Foreign Minister on matters of foreign industrial, commercial, and social affairs in which the oversea Dominions are interested, and inform their respective Governments.

(6) That the High Commissioners should become the sole channel of communication between Imperial and Dominion Governments, Governors-General and Governors on all occasions being given identical and simultaneous information.

4. *Interchange of civil servants :*

That it is in the interests of the Imperial Government, and also of the Governments of the oversea Dominions, that an interchange of selected officers of the respective Civil Services should take place from time to time, with a view to the acquirement of better knowledge for both services with regard to questions that may arise affecting the respective Governments.

5. *Universal penny postage :*

That in view of the social, political, and commercial advantages to accrue from a system of international penny postage, this Conference recommends to His Majesty's Government the advisability of approaching the Governments of other States known to be favourable to the scheme, with a view to united action being taken at the next meeting of the Congress of the Universal Postal Union.

6. *State-owned Atlantic Cable :*

That in order to secure a measure of unity in the cable and telegraph services within the Empire, the scheme of telegraph cables be extended by the laying of a State-owned cable between England and Canada, and that the powers of the Pacific Cable Board be extended to enable the Board to lay and control such cable.

7. *State-owned telegraph lines across Canada :*

That in order to facilitate the handling of the traffic, and to secure entire control over the route in which it is engaged, the powers of the Pacific Cable Board be extended to enable the Board to erect a land line across Canada.

8. *Cheapening of cable rates :*

That in view of the social and commercial advantages which would result from increased facilities for intercommunication between her dependencies and Great Britain, it is desirable that all possible means be taken to secure a reduction in cable rates throughout the Empire.

9. *Development of telegraphic communications within the Empire :*

That the great importance of wireless telegraphy for social, commercial, and defensive purposes renders it desirable that the scheme of wireless telegraphy approved at the Conference held at Melbourne in December 1909 be extended, as far as practicable, throughout the Empire, with the ultimate object of establishing a chain of British State-owned wireless stations, which, in emergency, would enable the Empire to be to a great extent independent of submarine cables.

10. *All-Red Mail Route between England, Australia, and New Zealand, via Canada :*

That in the interests of the Empire it is desirable that Great Britain should be connected with Canada, and, through Canada, with Australia and New Zealand, by the best mail service available.

That, for the purpose of carrying the above desideratum into effect, a mail service be established on the Pacific between Vancouver, Fiji, Auckland, and Sydney by first-class

steamers of not less than 10,000 tons, and capable of performing the voyage at an average speed of 16 knots. That in addition to this a fast service be established between Canada and Great Britain, the necessary financial support required for both purposes to be contributed by Great Britain, Canada, Australia, and New Zealand in equitable proportions.

11. *Imperial Court of Appeal :*

That it has now become evident, considering the growth of population, the diversity of laws enacted, and the differing public policies affecting legal interpretation in His Majesty's oversea Dominions, that no Imperial Court of Appeal can be satisfactory which does not include judicial representatives of these oversea Dominions.

12. *Uniformity of Laws :*

That it is in the best interests of the Empire that there should be more uniformity throughout its centres and dependencies in the law of copyright, patents, trade marks, companies, accident compensation, naturalization, immigration, aliens exclusion, currency, and coinage.

13. *Shipping :*

That the self-governing oversea Dominions have now reached a stage of development when they should be entrusted with wider legislative powers in respect to British and foreign shipping.

14. *Reciprocity in destitute persons law :*

That in order to relieve both wives and children, and the poor relief burdens of the United Kingdom and her Dependencies, reciprocal provisions should be made throughout the constituent parts of the Empire with respect to destitute and deserted persons.

15. *Income tax :*

That it is inequitable that persons resident in the United Kingdom who, under the laws of a self-governing dependency, pay an income or other tax to the Government of such dependency in respect of income or profits derived from the dependency should have to pay a further tax in respect of the same income or profits to the United Kingdom ; and therefore it is most desirable that Imperial legislation should be introduced to remove the disability.

16. *Stamp duty on Colonial bonds :*

That in order to encourage investment in the bonds of oversea Dominions it is desirable that debentures or other securities issued in the United Kingdom by, or on account of, the Governments of the self-governing dependencies should be exempted from stamp duty.

Australia [1] sent two vaguely worded resolutions on British commerce and shipping, and a third asking that attention be given to the present state of the navigation laws in the Empire and in other countries, with a view to secure uniformity of treatment to British shipping; to prevent unfair competition with British ships by foreign subsidized ships; to secure to British ships equal trading advantages with foreign ships; to secure the employment of British seamen on British ships; and to raise the status and improve the conditions of seamen employed on such ships.

4. *Uniformity of Company, Trade Mark, and Patent Law:*

That it is desirable, so far as circumstances permit, to secure and maintain uniformity in the company, trade mark, and patent laws of the Empire.

5. *Naturalization:*

That this Conference is in favour of the creation of a system which, while not limiting the right of a Dominion to legislate with regard to local naturalization, will permit the issue to persons fulfilling prescribed conditions of certificates of naturalization effective throughout the Empire, and refers to a subsidiary Conference the question of the best means to attain this end.

6. *Declaration of London:*

That it is regretted that the Dominions were not consulted prior to the acceptance by the British delegates of the terms of the Declaration of London; that it is not desirable that Great Britain should adopt the inclusion in Article 24 of foodstuffs, in view of the fact that so large a part of the trade of the Empire is in those articles; that it is not desirable that Great Britain should adopt the provisions of Articles 48–54, permitting the destruction of neutral vessels.

7. *Emigration:*

That the resolution of the Conference of 1907, which was in the following terms, be re-affirmed:

'That it is desirable to encourage British emigrants to proceed to British Colonies rather than foreign countries';

'That the Imperial Government be requested to co-operate with any Colonies desiring immigrants in assisting suitable persons to emigrate';

That the Secretary of State for the Colonies be requested to nominate representatives of the Dominions to the Committee of the Emigrants' Information Office.

[1] *Parl. Pap.*, Cd. 5513, pp. 8, 9.

8. *The law of Conspiracy :*

That the members of this Conference recommend to their respective Governments the desirableness of submitting measures to Parliament for the prevention of acts of conspiracy to defeat or evade the laws of any other part of the Empire ; that the Imperial Government make similar representations to the Governments of India and the Crown Colonies.

9. *Nationalization of the Atlantic cable :*

That this Conference strongly recommends the nationalization of the Atlantic cable in order to cheapen and render more effective telegraphic communication between Great Britain, Canada, Australia, and New Zealand by thus acquiring complete control of all the telegraphic and cable lines along the ' all red route '.

10. *Coinage and Measures :*

That with a view to facilitating trade and commerce throughout the Empire the question of the advisableness of recommending a reform of the present units of weights, measures, and coins ought to engage the earnest attention of this Conference.

11. *Imperial Appeal Court :*

That it is desirable that the judicial functions in regard to the Dominions now exercised by the Judicial Committee of the Privy Council should be vested in an Imperial Appeal Court, which should also be the final court of appeal for Great Britain and Ireland.

12. Co-operation and mutual relations between the naval and military forces of the United Kingdom and those of the Dominions and the status of Dominion navies.

The resolutions proposed by the Government of the Union of South Africa [1] for discussion at the Imperial Conference were of considerable interest and importance, and they touched upon certain points which had not been suggested for discussion by any other Dominion Government.

In the first place, it was desired by the Union Government definitely to raise the old question as to the division of the Colonial Office and the placing of the Dominions Department and the Imperial Secretariat under the control of the Prime Minister. The origin of this idea must be ascribed to Mr. Deakin, who, at the Colonial Conference of 1907, pressed energetically that the status of the Dominions should

[1] *Parl. Pap.*, Cd. 5513, p. 16.

receive full recognition in this manner. But at the time Sir H. Campbell-Bannerman was unwilling to accept the proposal and of necessity the project dropped. It had not been revived by any other Dominion, and the resolution as to the constitution of the Colonial Office proposed by Sir Joseph Ward was expressly opposed to the separation of the office at all, for it contemplated merely that the Secretary of State should receive a new title, namely the Secretary of State for Imperial Affairs, and that two permanent Under-Secretaries of State should be created.

Of the other resolutions the most important were those (Nos. 3 and 4) which suggested that if any naval contribution was given by a Dominion to the Imperial Government it should be permitted to deduct from the amount of that contribution any sums which it might expend in connexion with naval defence or the creation of naval bases, and that in place of the existing preferences granted by the Dominions, there should be substituted a system of contribution to Imperial naval and local defence. Naturally in this form the last resolution was hardly likely to be acceptable to the Imperial Government. Canada and Australia had definitely recognized responsibility in part at least for their own naval defence, and were creating navies with that end in view, while New Zealand had preferred to make a direct contribution towards the cost of the navy. But in either case there had been no disposition to suggest that the existing preferences should be modified or reduced, and the adoption of the proposal would have been purely disadvantageous to the Imperial Government.

The whole proposal was no doubt to be explained by the domestic circumstances of the Union. A direct payment was made by the Cape and Natal towards the cost of the navy, and the Union Government presumably wished to charge against that sum the amounts which it expended in local naval defence on land, and in this form the proposal was obviously reasonable, but to sacrifice for any naval contribution the benefits of the British preference would have been most unfortunate, and the Union Government later with-

drew the proposal *in toto*.[1] It is hardly likely that the other Dominions would have consented to the proposal, but of course the Union may decide to adopt the position which is already accepted by Newfoundland, under which it stands out altogether from the principle of preference. It is fair to admit that preference has never been very popular in South Africa, where it was adopted under the influence of the Transvaal before the grant of self-government.

Of the other resolutions the only one of consequence was that (No. 5) referring to naturalization. In South Africa the matter was complicated by the objection of the Colonies to naturalize coloured persons, and South Africa would never be willing to come into a naturalization system which would secure for a person naturalized out of South Africa, even if a coloured person, the full rights of a natural-born subject. But it does not appear that the grant of such rights had ever been contemplated by the Imperial Government.

Of the remaining resolutions, No. 2 asked for concerted action to promote better trade and postal communications, and to discourage shipping conferences and combines for the control of freight rates, a pressing South Africa question;[2] and No. 6 asked that the Imperial Exchequer should in cases of death duties and income tax make an allowance for sums fairly claimed for those purposes in the Colonies.

§ 3. The Dominion Parliaments and the Agenda

The question of the Agenda for the Imperial Conference was discussed as early in New Zealand[3] as September 23, 1910. Mr. Herries, a member of the Opposition, raised the question that the proposals to be brought before the Conference should be laid before the Legislatures of the several Dominions, so that the Legislatures might be able to express their opinion as to the attitude to be adopted by their representatives. The Prime Minister, or whoever represented the Dominion, was only a delegate to express the views of the people whom he represented. If matters were submitted no party spirit

[1] *Parl. Pap.*, Cd. 5513, p. 15.

[2] The Postal Act of the Union Parliament (1911) forbids any mail contract to be given to a conference line.

[3] *Debates*, cli. 827 seq.

would be shown, and the expression of opinion by the Legislature would have more weight with the Imperial Government and the other Dominion Governments than if it were merely the opinion of the New Zealand Cabinet. Supposing the question of an Imperial Council arose, had the Prime Minister any idea of what the opinion of the Parliament would be or what the opinion of the country would be? Unless the matter were discussed in the Parliament it would be impossible for the Prime Minister to have any certainty that he was representing the wishes of the people or even that he was representing the wishes of the Parliament. He thought that with regard to Imperial relations things were drifting, and that though matters were satisfactory at present there might be danger if in the future Ministries at home were more indifferent than they were at present to Imperial considerations. He thought that the Prime Minister ought to be in a position to recommend a scheme for closer relations, as he had inherited the Imperial policy of Mr. Seddon, and a discussion of the whole question in Parliament would be of great educative value. He thought that the Prime Ministers of the Dominions should form a sort of Imperial Cabinet and be consulted on all questions of Imperial import. That would be a good substitute for an Imperial Council, and the Premiers could be consulted by telegraph. He did not believe in a representative body sitting in London, because by the time the delegates got there they might not be representative. He wished to know whether the Dominions since they had been Dominions were consulted in any way with regard to Imperial politics as distinct from English, Irish, or Scotch politics. If New Zealand paid a certain amount to the upkeep of the fleet they ought to have a voice in the distribution of the fleet and in deciding the question of peace or war. He did not know whether enough was now being paid to make it a live subject, but supposing contributions were increased, the question must and would arise as to what say the Colonies which contributed were to have in the question of the fleet or the question of the army. Then again there was the question which he

had before raised of the actual relationship of the Colonies as an integral part of the Empire; for example, could a Dominion or a Colony be surrendered in the same way as France had to give up Alsace-Lorraine as a result of the Franco-German War? There should be some sort of constitutional system which should prevent such a diplomatic catastrophe. Sir Joseph Ward considered that it was quite impossible to discuss matters usefully before the Conference. It was the duty of any representative of New Zealand to remember that the Parliament of New Zealand must ratify whatever was agreed upon by the Conference. That was sufficient safeguard, and it would be quite impossible to discuss within reasonable limits all the resolutions which would be raised.

On November 23 a further brief discussion took place.[1] Mr. Taylor, a member of the Opposition, raised the question as to the position of the Dominions in respect of Imperial Conferences. It was proposed, he gathered, to convert the position of High Commissioner for each of the self-governing Dominions into a political office, and if this were done there would be a direct diminution in the power of the Parliament of New Zealand. He looked with great jealousy upon the possibility of the curtailment by the Imperial Conference of the powers of the New Zealand Parliament. In reply, Sir Joseph Ward said that the Government could not be responsible for suggestions made by the press, and if any resolution of the nature indicated were to be passed by the Imperial Conference they would place themselves in the position of being politely told to mind their own business. The Government were responsible to the people of their own country for what they believed would be in their interests. If a representative of New Zealand at the Imperial Conference attempted to pass a resolution interfering with the internal politics of Great Britain, the answer would be that it was entirely outside their domain, and that New Zealand should leave the home authorities to manage their own internal affairs, and the reverse principle applied.

[1] *Debates*, cliii. 913 seq.

The proposals which the Australian Government desired to lay before the Imperial Conference were brought before the Commonwealth Parliament on November 25, in connexion with the Supplementary Estimates.[1] The list of subjects was laid before the House by Mr. Hughes in a short speech in which he coupled the question with that of the invitation which had been sent by a committee of members of both Houses of Parliament in the United Kingdom to members of Parliament of the Commonwealth to be present as their guests during the period of His Majesty's Coronation. Mr. Deakin [2] strongly approved the invitation to members of Parliament to be present at the Coronation, and he dwelt at some length on the advantages of the system of Imperial Conferences. Up to 1887 the Dominions ranked only as dependencies, and practically communicated only by dispatches. There was no recognition of the fact that British people whose homes were oversea were entitled to Imperial citizenship. The meeting of 1907, if less fruitful than it might have been in actual achievement, marked a distinction. Never before was such weight attached to such a gathering ; never before were so many great questions exhaustively considered ; never before was so strong an impetus given to the further development of this great institution. He regretted very much that the proposal put forward by the Government had not been debated, in order that the ministers might have spoken in Conference with the support of Parliament. He suggested that patents and trade marks and trade statistics should be added to the agenda, and he asked that the establishment of a single Imperial Court of final appeal should be accepted. If the Court of Appeal that was given to Australia, however eminent it might be—and he admitted that it had been immensely improved during the last few years—was not good enough for the citizens of the British Isles, it was not good enough for Australia, and he hoped that the question would be again urged at the forthcoming Conference. All Australian appeals should go to the House of Lords, which

[1] *Parliamentary Debates*, 1910, pp. 6852–71.

[2] Ibid., pp. 6854 seq.

should be supplemented by at least one Australian, one Canadian, and one South African judge.

Mr. Deakin also urged that the powers of the Conference should be increased, and it should cease to be merely advisory. The needs and emergencies of the Empire were growing and made every year greater demands for Imperial action and often for united action by all the oversea Dominions. That united action was only to be obtained when, instead of a Conference separated by breaks of four years, continuity in character were given to its policy by providing means of keeping up the work, following up its suggestions, and giving effect to its resolutions. By that means only could the Conference be vested with the power that rightly belonged to it, making it a thoroughly Imperial body representative of the British race in every part of the world, without trenching on the local Governments of the Dominions or on the sphere of the British Government. It was by means of an Imperial Conference and no other way that the people over seas could obtain a voice in Imperial affairs, which were their own affairs, as they were affected by interests or actions within or without the Empire. By means of the Conference Australia had now some voice in the Councils of the Empire. Every grant of power or influence through the Conference was a gain of status. He remembered the time when there was no distinction between self-governing and Crown Colonies, when the self-governing Colonies were not expected to possess difficulties or problems which could not be settled by the Colonial Office. He hoped that ministers would attach the greatest importance to the proposition that the self-governing Colonies should not remain associated in the same department or with the same officials as the Crown Colonies.[1] These Colonies were under control and subject to advice and dictation which self-governing Dominions could not receive, except in another fashion, of whose acceptance they must be the ultimate judges. The Conference and the affairs under it should be entirely independent of the Crown Colonies Depart-

[1] As will be seen from *Parl. Pap.*, Cd. 3795, the desired separation was effected in 1907 by Lord Elgin, but Mr. Deakin disliked it, Cd. 5273, pp. 4, 5.

ment, and the self-governing communities were entitled to be associated with a department, which would never forget that they were self-governing and that its relations with them were not of a dictatorial character. He referred, with approval, to the visit of Sir Charles Lucas in 1909, and to the value of the High Commissioner, who had direct access to the Secretary of State. He alluded also to the necessity of Australia having a foreign policy in the Pacific, and especially of a larger share of the control of the New Hebrides being granted. Ministers must insist in London on the importance of the Western Pacific to Australia. This could be carried out best by having Australian officials representing Australia on the Imperial Secretariat, together with other officers to represent the other Dominions. They should be subject to the British Prime Minister, but maintained at the cost of the Dominions, and they should carry out the instructions sent to them from the Dominions.

Mr. Deakin also regretted that there was no allusion to the development of preferential trade, and he referred to the enormous advantage that had been gained at the last Conference by obtaining the profits of £150,000 a year on silver coinage.

Sir William Lyne[1] shared generally the views of Mr. Deakin, and especially with regard to the secretariat, which he thought should be kept entirely distinct from the present Colonial administration of England. He was inclined to be in favour of an Imperial Court of Appeal, without going so far as did Mr. Deakin.

Mr. Glynn referred to the case of the Declaration of London, to the question of naturalization—in which he alluded to the difficulty of the colour question—and to the question of the Imperial Court.

In Canada a debate in the House of Commons was delayed until April 20, 1911.

The question was raised by Mr. Foster,[2] formerly Finance

[1] *Parliamentary Debates*, 1910, pp. 6861 seq.

[2] *House of Commons Debates*, 1910–1, pp. 7504–24; cf. 1909–10, pp. 410 seq.

Minister in the Conservative Government, and then one of the leaders of the Opposition to Sir Wilfrid Laurier's administration, who made use of the subject as a convenient mode of attacking the Canadian Government for lack of energy in furthering the interests of the Imperial Conference. He pointed out that the published papers showed clearly that the Secretariat had more than fulfilled the duties which were cast upon them by the resolution of the Colonial Conference of 1907; that all the subjects dealt with by that Conference had given rise to an elaborate correspondence, with regard to which indifference and delay had been shown in a marked degree by the Canadian Government. In particular he pointed out how extremely slow Canada had been to reply to the repeated efforts of the Secretary of State to induce them to submit some subject for consideration at the Conference of 1911. He contrasted the action of New Zealand and that of the Commonwealth, both of which had brought forward a long string of subjects which they desired to submit to the Conference, while even the Union of South Africa, despite its recent formation, had sent three or four subjects which they desired to have discussed. Newfoundland itself had shown interest in the question of steamship communication with the United Kingdom, while Canada, which had brought forward that topic at the Conference of 1907, had since let the matter rest, and had taken no further action with regard to it.

In reply, Sir Wilfrid Laurier[1] adopted and repeated the eulogies pronounced by Mr. Foster on the Imperial Secretariat, showing the advantages of the adoption of the plan of having a secretariat in preference to the more far-reaching proposals for an Imperial Council which had been urged by Mr. Deakin at the Conference of 1907, and which he had been compelled to criticize on the ground that the time was not yet ripe for such advanced proceedings. At the same time he paid a very handsome compliment to Mr. Deakin, whose absence from the Conference of 1911 he thought was much to be regretted. His explanation of the failure of Canada to put

[1] *House of Commons Debates*, 1910–1, pp. 7524–30.

forward any subjects for discussion was that in his opinion there was sufficient work left over from the last Conference to occupy fully the time of the new Conference, and that his Government had therefore thought it advisable not to bring forward new subjects, which would diminish the chance of the old questions still in debate being successfully disposed of. He stated that his Government still adhered to their determination to secure, if possible, the carrying out of the project of the All-Red Route. So far as communications across the Atlantic were concerned, he did not doubt that the matter could be arranged; the difficulty lay in the question of the Pacific and in the attitude of Australia towards the scheme. So far it did not appear that any scheme which could conveniently be produced would shorten appreciably the time taken between England and Australia, and unless this could be done it was doubtful whether the Australian Government could be persuaded to spend money on the service. Moreover, their closer commercial relations with New Zealand rendered Australia more unwilling to do anything to facilitate trade between the two Dominions; but he trusted that it would be found possible on the occasion of the meeting of the ministers at the Imperial Conference to arrange for some degree of preferential trade between Canada and Australia, a step which might be assumed to result in the increase of the willingness of Australia to assist in the establishment of better communications between the Commonwealth and Canada.

On this occasion Sir Wilfrid Laurier made no mention[1] of a question which he had raised previously,[2] namely the question whether some recognition should not be given of the quasi-diplomatic status enjoyed in Canada and the other Dominions by Consuls-General and Consuls of the great Powers. The point has been discussed at considerable length in Canada, especially in connexion with the question of precedence. Consuls at present have no precedence of right, as they have no diplomatic status, and it has been brought

[1] The subject was not mentioned at the Conference at all.

[2] See Canada *House of Commons Debates*, December 7, 1910, p. 978.

more and more prominently forward by the tariff negotiations which have recently taken place with the German, Italian, Belgian, Netherlands, and Japanese Consuls-General or Consuls.

On the question of naturalization, however, Sir Wilfrid Laurier indicated as a difficulty the fact that while by naturalization in Canada an American became a Canadian citizen, he did not when outside the limits of Canada become a British citizen at all, and this position was an unfortunate one, as tending to accentuate the distinction between Canadian citizenship and membership of the Empire.

§ 4. The Proceedings of the Conference [1]

The Conference held twelve meetings from May 23 to June 20. Thirteen ministers attended,[2] and for the first time the Prime Minister presided almost throughout the proceedings. The business character of the proceedings was also increased by the strict adherence to the rule of excluding from the Conference all Imperial ministers who were not actually required to attend for purposes of discussion. The Secretary of State for the Colonies, of course, attended all the meetings and took the chair in the absence of the Prime Minister; on one occasion, in Mr. Harcourt's unavoidable absence, Sir W. Laurier took his place. There were also present, on various occasions, the Secretaries of State for Home Affairs, Foreign Affairs, War, and India, the Chancellor of the Exchequer, the Lord Chancellor, the Presidents of the Board of Trade and the Local Government Board, and the Postmaster-General.

The proceedings were, as in 1907, private, but a daily précis of the Conference was published, and a full report appeared in July after revision by the members. Sir Joseph

[1] For the précis, see *Parl. Pap.*, Cd. 5741; for the Report, Cd. 5745; for the papers presented, Cd. 5746–1, 5746–2.

[2] Right Hon. Sir W. Laurier, Hon. Sir F. Borden (Minister of Defence), and Hon. L. P. Brodeur (Minister of Marine) represented Canada; Hon. A. Fisher, the late Hon. E. L. Batchelor (Minister of External Affairs), and Hon. G. F. Pearce (Minister of Defence), Australia; Right Hon. Sir J. Ward and Hon. Dr. (now Sir J.) Findlay (Attorney-General), New Zealand; Right Hon.

Ward's motion for publicity was unanimously rejected by his colleagues,[1] and in 1907 he himself had not favoured it.

Of the topics discussed those of political importance were (*a*) the question of the Imperial Council and the reorganization of the Colonial Office; (*b*) the questions of foreign politics arising from the Declaration of London and the desire of the Dominions to be freed from inconvenient treaties; (*c*) the question of British Indians, especially as connected with merchant shipping; (*d*) the Imperial Court of Appeal; (*e*) Naturalization.

Less immediately political were the discussions as to (*f*) the improvement of commercial relations, (*g*) the All-Red Route, and (*h*) emigration and labour exchanges. Another group of topics was (*i*) proposals for postal and telegraph reform, and efforts were made to secure (*j*) reciprocity as to income-tax and death-duties. The attempt to secure (*k*) either decimal coinage or the metric system of weights and measures was not seriously pressed. On the other hand, (*l*) shipping conferences and rebates evoked an animated discussion. The usual proposals for (*m*) uniformity in law, including the topics of alien immigration exclusion, companies, copyright, patents, trade marks, and accident compensation, were hardly debated, though more progress was made with (*n*) the question of reciprocal legislation as to deserted and destitute persons. The advisability of extending the (*o*) recognition of Colonial and Imperial judgements was asserted, (*p*) co-operation as to international exhibitions was agreed to in principle, and a far-reaching scheme of (*q*) reciprocal legislation as to conspiracy was allowed to drop. Resolutions were also agreed to as to (*r*) Suez Canal dues and (*s*) the celebration of the King's birthday, and Mr. Fisher

General Botha, Hon. F. S. Malan (Minister of Education), and Hon. Sir D. de V. Graaff (Minister of Public Works, Posts, and Telegraphs), Union of South Africa; Hon. Sir E. P. Morris and Hon. R. Watson (Colonial Secretary), Newfoundland. The Secretaries were Mr. (now Sir) H. W. Just, Mr. W. A. Robinson (Senior Assistant Secretary), and Dr. A. Berriedale Keith (Junior Assistant Secretary).

[1] Cd. 5745, pp. 28–32.

finally moved (*t*) resolutions in favour of holding a further Conference in one of the Dominions, and a reciprocal interchange of ministerial visits.

(*a*) *The Imperial Council and the Reorganization of the Colonial Office*[1]

The proposal for the establishment of an Imperial Council of State brought forward by the Government of New Zealand assumed in the course of discussion a somewhat different form. Sir Joseph Ward, in developing the proposal, dwelt upon the constant growth of the self-governing Dominions and on their just claim to be given a share, though at present a subordinate share, in the conduct of Imperial policy. At present the Imperial Government[2] was solely responsible for the issues of peace and war, and thus by its policy it could involve the self-governing Dominions in war, even though it remained for those Dominions to decide to what extent they would actually co-operate.

To remedy the defect he proposed that there should be established a Parliament of Defence, which would include the consideration of foreign policy and of international treaties in so far as they affected the Empire and such other Imperial matters as might by agreement be transferred to such a Parliament. He proposed that Canada, Australia, South Africa, New Zealand, and Newfoundland should elect to an Imperial House of Representatives for Defence one repre-

[1] Cd. 5745, pp. 36 seq. Cf. Col. Hughes's similar scheme, Canada *House of Commons Debates*, 1906–7, pp. 2840 seq.

[2] The Imperial Government is the Government of the United Kingdom (the two are used synonymously in the Proceedings and Resolutions) as matters now stand, and Sir J. Ward's proposal was to make it Imperial in the larger sense of including representatives of the Empire as a whole. In his interesting study of *Imperialism* (Ottawa, 1911), Mr. J. S. Ewart seems to forget that historically Imperial as used of the British Crown and Government is rather a signification of independent sovereignty (on a footing of equality with the Roman Empire—recognized in the case of William III formally by the Empire) than of control over dependencies. The British Empire connotes really the whole as an independent unit of international law, not a dominion of one part over the rest. Cf. 24 Hen. VIII. c. 12.

sentative for each 200,000 of their white population ; that is, Canada 37, Australia 25, South Africa 7, New Zealand 6, and Newfoundland 2 members, making a total of 77. The mode of election was to be left in each case to be determined by the Dominion in question. The United Kingdom should elect representatives on the same basis, say 220 members, and the term for which they were elected should be five years. In addition, the United Kingdom and each of the Dominions should elect for such term and in such manner as it should think fit two representatives to be members of an Imperial Council of Defence, the functions of the Council to be in the main consultative and revisory. There would be an executive of not more than 15 members, of whom not more than one should be a member of the Senate, and the functions of the Imperial Parliament of Defence would be peace and war, treaties and foreign relations generally in their bearing on Imperial defence, and the providing of the revenues for the foregoing purposes. For the first ten years the Parliament should have no power of taxation, but the amount payable by each of the Dominions should be a debt payable to the exchequer of the Imperial Parliament of Defence. At the expiration of ten years such amount should be raised and paid in such manner as the respective Dominions agreed to. The amount to be contributed by the overseas Dominions for Imperial defence and war should be *per capita* of population not more than 50 per cent. of the amount *per capita* of population contributed by the United Kingdom for this purpose, but for all other purposes the contributions should be on an equal *per capita* basis. He recognized that his scheme presupposed an alteration in the United Kingdom to a federal system. He put forward detailed proposals as to the raising of a revenue in future for naval defence and the building of a large fleet of Dreadnoughts.

In answer to further questions, Sir Joseph Ward explained that the executive responsibility with regard to war and peace would rest with the Executive Council of fifteen, which would be elected by and responsible to the Parliament body, and he argued that the large predominance of the

representatives of the United Kingdom on the Parliament body would make up for the loss by the Imperial Government of its present control of foreign relations. In fact the Imperial Government would have practically the same power as at present, but it would be a real Imperial Government, as the Dominions would be indirectly represented. Sir Joseph Ward added that even if no member of the Conference should be in agreement with his views he would still hold that the existing position was unsatisfactory, and that some measure must be devised for the representation of the growing democracies of the Dominions.

The proposal, however, failed to find acceptance in any quarter. Sir Wilfrid Laurier[1] said that even had the resolution remained in its original form he would have had some difficulty in accepting it, but a legislative body which had power to impose expenditure but could not raise revenue was quite indefensible, and the proposal was absolutely impracticable. Mr. Fisher[2] was of opinion that there was nothing the matter with the Government of the Empire which could not be removed by conference from time to time. Even had the proposal as originally drafted been put forward he could not have accepted it in that form. General Botha[3] was also unable to concur in the proposal; he was of opinion that an Imperial Council must necessarily encroach upon the self-governing powers of the various parts of the Empire. He did not think that the time was yet ripe for the coming into existence of a body of elective representatives of the different parts of the Empire. Sir Edward Morris[4] also thought that nothing could yet be done: eventually some representation in the Imperial Parliament would be desirable, but the control of war and treaties and foreign affairs must at least for a very long time still rest in the hands of the Imperial Government.

Mr. Asquith,[5] on behalf of the Imperial Government, referred to the memorial presented to him by a large number

[1] Cd. 5745, pp. 67, 68. See Sir J. Ward's reply on p. 72.
[2] Ibid., pp. 68, 69.
[3] Ibid., pp. 69, 70.
[4] Ibid., pp. 70, 71.
[5] Ibid., pp. 71, 72.

of members of the House of Commons in favour of steps being taken to associate the Dominions with the conduct of Imperial affairs.[1] From the Imperial point of view the authority of the Government of the United Kingdom would be hopelessly impaired by the creation of the new Council, and from the point of view of the Dominions the new Council would interfere with their self-government.

The resolutions proposed by the Government of New Zealand for the reconstruction of the Colonial Office were not formally moved by Sir Joseph Ward, because, with his permission, the Secretary of State for the Colonies,[2] with a view to abbreviating the discussion, put forward certain suggestions of the Imperial Government with regard to the matter. Mr. Harcourt explained that the office was already in effect completely divided below the Permanent Under-Secretary of State. There were the Dominions Department and the Crown Colonies Department, and in common the General Department, including the legal branch, the registries, the library, the accounts branch, the copying branch, the printing branch, and honours, and similar questions. The Imperial Government were prepared to create two Permanent Under-Secretaries if desired, but for office purposes it would be difficult, and again, the only person, if the change were made, who had experience of the Dominions and Crown Colonies work would be the political chief.

Moreover, it would no doubt be desired by both Australia and New Zealand that the Dominions Under-Secretary should have knowledge of the work in the Pacific and in the South African Protectorates, and even Canada was interested in the West Indies.[3] Then as regards the Secretariat, there

[1] See *House of Commons Debates*, April 19, 1911, xxiv. 957 seq. Special stress was laid in this somewhat academic discussion on the advantages of a full explanation of foreign politics being made to the Prime Ministers of the Dominions.

[2] Cd. 5745, pp. 76 seq.

[3] Cf. the proposal in Bahamas in 1911 for union with Canada, and the Royal Commission of 1910 for the consideration of the relations of Canada and the West Indies; see its Report in Cd. 5369, and cf. Cd. 5582, pp. 7, 8; 4991, 5370, 5371. Canada and the West Indies co-operate in a steamer service for goods and mails; cf. Cd. 86, 3096.

already existed one which had been highly praised by Sir Wilfrid Laurier in the Dominion Parliament. To increase the utility of the Secretariat the Imperial Government were prepared to set up a standing committee of the Imperial Conference which would contain the Secretary of State, the Parliamentary Under-Secretary, Permanent Under-Secretary, Under-Secretary for the Dominions, and the High Commissioners or other representatives of the self-governing Dominions, and the Secretary would be chosen from the Dominions Department. The business of this committee would be to consider the carrying out of resolutions arrived at at Imperial Conferences, proposals for the next conference, and subsidiary and cognate matters. The committee must be absolutely advisory and not executive. It would advise the Secretary of State, who would communicate with the Dominion Governments as to the discussions of the committee, but of course the High Commissioners could also communicate with the Dominion Governments. The Secretary of State should have the power to summon the political or permanent heads of other Government departments to deal with technical questions. He inquired what position the Dominions would desire the High Commissioners to occupy in the scheme. In the discussion which followed certain difficulties were pointed out. Sir Wilfrid Laurier [1] was anxious that nothing should go before the committee which would affect merely the relations between one Dominion and the United Kingdom ; the South African representatives [2] were doubtful as to whether it would not be inadvisable to make the High Commissioner a political officer, as of course he was in the main required for commercial business, and it might be difficult to make a suitable selection if the officer concerned were required to be a political agent. On the other hand, Mr. Fisher [3] was anxious for a very free consultation between the High Commissioner and the Imperial Government with regard to foreign affairs. Sir Joseph Ward [4] urged strongly that, in the interests of the continuity of the work of the

[1] Cd. 5745, pp. 83 seq.
[2] Ibid., pp. 91 seq.
[3] Ibid., pp. 87, 88.
[4] Ibid., pp. 80 seq.

Conference, it was essential that something should be done to maintain touch between the several Conferences, and he pressed for the further consideration of his scheme. Mr. Harcourt, therefore, undertook to circulate a definite proposal to the Conference for consideration.

At the meeting of June 8 the Conference resumed the discussion of the question of the proposed Standing Committee of the Imperial Conference which had been brought forward by the Imperial Government.[1] Mr. Harcourt had circulated for the consideration of the Conference a memorandum [2] in which he had outlined more precisely the nature of his proposal. He reminded the Conference that in the last paragraph of the first resolution of the Conference of 1907 it had been agreed 'that upon matters of importance requiring consultation between two or more Governments which cannot conveniently be postponed until the next Conference, or involving subjects of a minor character or such as call for detailed consideration, subsidiary Conferences should be held between representatives of the Governments concerned specially chosen for the purpose'. In accordance with this resolution two subsidiary Conferences—the Defence Conference of 1909 and the Copyright Conference of 1910—had been held, and His Majesty's Government now suggested that any matters which could not conveniently be dealt with by subsidiary Conferences should be referred, with the consent of the several Governments, to a Standing Committee of the Imperial Conference, which would thus be a subsidiary Conference not limited to one subject, and meeting at more or less regular intervals for the transaction of business referred to it by the Secretary of State for the Colonies with the assent of the Dominion Governments. As a parallel to such a Committee were adduced the Standing Committee of the Board of Trade, which advised the Board of Trade on commercial intelligence and the diffusion of commercial information, and the Advisory Committee appointed to advise the Board of Trade and the Colonial Office upon the administrative work of the Imperial Institute, and reference

[1] Cd. 5745, pp. 173 seq. [2] See Cd. 5746-1, pp. 212–4.

was made also to the Advisory Committee unanimously recommended by the Imperial Education Conference of 1911. The committee would consist of the Secretary of State for the Colonies, the Parliamentary and Permanent Under-Secretaries, the Assistant Under-Secretary for the Dominions, the Secretary to the Imperial Conference, the High Commissioners or other representatives of the Dominions, and in addition the Secretary of State would have a right to summon to any meeting the political or permanent heads of other departments which might be specially concerned in subjects to be discussed. The committee would be purely advisory, not executive. It would be advisory of the Secretary of State, would deal only with matters concerning the last Conference or preparations for the next Conference, or any other matters which seemed to be appropriate questions between both. The Dominion Governments would in every case be consulted as to their willingness for the submission of questions to the committee, and the advice of the committee would be given to the Secretary of State and communicated to the Dominion Governments through the Governors-General, though the High Commissioners or other representatives of the Dominions would of course be at liberty to inform their Governments of the proceedings. Apart from Conference questions the ordinary communications of the Secretary of State with the Governors-General of the Dominions would continue as at present. It was explained that the Imperial Government did not desire to press the appointment of such a standing committee should the Dominion ministers be unwilling to accept the proposal, but they thought that a standing authority might be of substantial advantage in securing efficiency of working of the Secretariat and the Conference.

Sir Joseph Ward [1] advocated the adoption of the proposal subject to the omission of the express reference to the High Commissioners, as he preferred that the Governments should be left entirely free as to what representatives they should choose. Mr. Fisher [2] also considered that it was desirable, in

[1] Cd. 5745, pp. 174 seq. [2] Ibid., p. 176.

view of the frankness with which the Imperial Government had taken the Dominion Ministers into their confidence, that there should be some subsidiary body to facilitate closer communication, and he agreed that such a body, if established, should be purely advisory. Mr. Batchelor [1] thought that the advisability of such a standing committee was not open to doubt, especially in view of the fact that no question could be referred to the committee without the consent of all the Dominion Governments. But General Botha [2] was quite unable to accept the proposal. He pointed out that the object of the Conference required the attendance of members of ministerial standing, and that it would be unsatisfactory if some ministers sent their High Commissioners to represent them and others were represented by ministers. He was wholly in favour of subsidiary Conferences to which ministers would be sent, but he could not accept a standing committee which would interfere in any way with the work of the responsible Governments. Sir Edward Morris [3] shared General Botha's view. Nothing could be done with the proposed committee which could not be done by the various public departments in correspondence with the Dominions through the Colonial Office. Conferences were not able really to do much work directly; the present Conference had had a comprehensive agenda put before it, but the net result would probably only be one or two important matters which were not on the agenda at all. To set up the proposed body would lead to circumlocution and confusion.

Sir Wilfrid Laurier [4] viewed with serious apprehension the intervention of any body whatever between the Home Government and the Governments of the Dominions. The relations between the Dominions and the Mother Country should be carried on directly by the Governments themselves. The organization of the Colonial Office had given ample satisfaction, and he thought that matters should be left as they were. The views of South Africa were reinforced by Mr. Malan,[5] who thought that the committee would lower

[1] Cd. 5745, p. 176. [2] Ibid., pp. 177–9.
[3] Ibid., pp. 177, 180. [4] Ibid., pp. 180, 181. [5] Ibid., pp. 182, 183.

the status of the Dominions as compared with that of the United Kingdom, for if it were advisory to the Secretary of State, it would seem to follow that the conference itself would be merely advisory to the Secretary of State. If, moreover, the High Commissioners sat on the committee, there would be no advantage over the present position, for the High Commissioners were officials only, and they could not, like Prime Ministers assembled in Conference, be expected to take the larger view of the interests of the whole country and even of the whole Empire. The day might come when different arrangements might have to be made, but when it did come these arrangements must be on the sound British principle, not of government by officials, but of government by persons elected by, and responsible to the people.

As a result of the discussion Mr. Harcourt [1] immediately declared that there was not sufficient unanimity to make it worth while to proceed with the proposal. The suggestion was made in order to meet what was understood to be the wish of some of the Dominions, and it did not represent any conscious want on the part of the Home Government. Sir Joseph Ward [2] much regretted the rejection of the proposal, and he laid stress upon the necessity of some means of continuing the work of the Conference during the interval when it was not in session, and on the great difficulty of sending ministers from so distant a place as New Zealand to sit on subsidiary Conferences, and without such subsidiary Conferences it was impossible for the Dominion Governments to co-operate. The proposal would not in any way have prejudiced the position with regard to the Imperial Council which he had proposed, and he was sure that that Council would come in any case when public opinion was ripe for such a reform.

Finally Sir Joseph Ward formally withdrew his resolution, and the Government of South Africa withdrew their resolution in favour of placing the Dominions Department of the Colonial Office under the Prime Minister; this was shown

[1] Cd. 5745, p. 193.

[2] Ibid., pp. 188 seq.

by the Prime Minister to be impossible in practice: there were 27,000 papers a year to be dealt with, of which 1,000 must go before the political head of the office, and no Prime Minister could face the duty. Sir J. Ward also withdrew his proposed change of the title of the Secretary of State.[1]

The Conference then discussed the question of the interchange of civil servants which was brought forward by Sir Joseph Ward,[2] viz. 'That it is in the interests of the Imperial Government and also of the Governments of the overseas Dominions, that an interchange of selected officers of the respective Civil Services should take place from time to time with a view to the acquirement of better knowledge for both services with regard to questions that may arise affecting the respective Governments. Mr. Harcourt sympathized with the view that there should be greater mutual knowledge, but he dealt upon the difficulties which lay in the way of a formal interchange of civil servants. If, however, any Dominion Government sent over representatives and attached them to the High Commissioners' Office, they would be given full facilities to become acquainted with the work of the different public departments. Similarly, members of the Colonial Office had been attached to the staff of the Governors-General of the Union of South Africa, the Dominion of Canada, and the Commonwealth of Australia, and the Colonial Office would have the advantage of their knowledge and experience when they returned, while visits had been paid to some of the Dominions by Sir Charles Lucas and Mr. Just. He would be glad also to afford any further assistance possible to the Dominion Governments. Mr. Batchelor for the Commonwealth of Australia accepted the view of Mr. Harcourt, and the resolution was therefore adopted with the substitution of 'visits' for the proposal of interchange.

[1] The dislike to the word Colony as applied to self-governing dominions, though real (cf. Ewart, *The Kingdom Papers*, pp. 20–2, and Mr. Lynch's successful blocking of a Governor's Pension Bill which used the term in 1911), is not very intelligible to Englishmen, and *de facto* Dominion Ministries constantly use it. Dominion has no adjectival equivalent.

[2] Ibid., pp. 194–6.

(b) The Declaration of London and the Treaty Power

The discussion with regard to the question of the Declaration of London was initiated by Mr. Fisher,[1] who explained that the matter on which he desired in the main to lay stress was the fact that it was desirable that in such cases the Dominion Governments should be consulted before international agreements were actually drawn up. The actual criticisms which would be made on the terms of the agreement were not in his opinion of such importance, and were matters in which he recognized the Imperial Government must ultimately decide; but he contended for the principle that the time had come when it was both convenient and proper that the self-governing Dominions should be consulted before negotiations were agreed to.

Mr. Batchelor[2] also expressed the same opinion, and pointed out that the Commonwealth had inquired in 1909 as to whether some alterations could not be made in the terms of the Declaration, and they had been told among other things that it was too late then to take any action. The Commonwealth had acted as soon as they knew of the existence of the Declaration, and his contention was that they should have been informed of the matter at an earlier date.

The detailed criticisms put forward by Mr. Batchelor with regard to the Declaration were in the main those which have been urged repeatedly in this country. In Australia dissatisfaction was felt with the rules under which food was regarded as conditional contraband, inasmuch as the vagueness of the terms of the Convention might render it impossible to send food at all to Great Britain in case of war without it running the risk of being confiscated as being contraband of war.

Moreover, the Australian Government objected to the provisions which permitted the sinking of neutral vessels by belligerents, and they held that it would be possible on this,

[1] Cd. 5745, pp. 97, 98. The Conference had before them *Parl. Pap.*, Cd. 4554, 5418; *House of Lords Debates*, March 8, 9, and 13, and notes by Lord Desart; Cd. 5746–1, pp. 4–20.

[2] Ibid., pp. 98 seq.

and on the question of the conversion of merchant vessels into men-of-war to obtain some modification before the Convention finally took effect.

Sir Edward Grey[1] then explained the views held by His Majesty's Government both as to the merits of the Convention and the question of consulting the Dominions with regard to treaties.

On the merits of the Convention he elaborated the fact that the Convention arose out of the decision to set up a Prize Court arrived at at The Hague in 1907; he contended that such a Prize Court was an unquestionable improvement on the existing arrangement under which the Courts of belligerents decided finally on the complaints of neutrals in respect of the seizure of neutral vessels. But it was essential to draw up some rules for the guidance of the Court, and this explained the fact of the drawing up of the rules embodied in the Declaration of London. As regards the substance of these rules it must be remembered that they were a compromise. Great Britain had secured very considerable concessions from other Powers. Before the Declaration there was nothing to prevent any foreign Power declaring all food contraband, and now it could only do so under strictly defined conditions, and indeed the onus was normally thrown on the captor, and not as hitherto on the ship, to prove the offence of carrying contraband.

Similarly, though His Majesty's Government disliked very much the sinking of neutral vessels, they had found that many of the Great Powers were not prepared to share their view on this matter, and the United States in particular had been very anxious that the compromise embodied in the Declaration of London should be accepted, as representing at any rate a considerable improvement on the arrangements which existed before the Declaration.

With regard to the question of consulting the Dominions as to treaties, Sir E. Grey explained that the fact that they were not consulted with regard to the Declaration arose out of the fact that they were not consulted as regards Hague

[1] Cd. 5745, pp. 104 seq.

Conventions. He was quite prepared that in the future the Dominions should be consulted, and that representatives should take part in any inter-departmental Conference which might be held to discuss such questions, but he emphasized the fact that in many cases it would be necessary in the actual course of negotiations for the Foreign Secretary to accept responsibility for a decision, just as indeed he did with regard to the other members of the Imperial Cabinet; time would often not permit of the formal consultation of any one save the Prime Minister on such questions as these.

Sir Wilfrid Laurier [1] was not, however, quite prepared to accept the principle that the Dominions must be consulted with regard to treaties of a political character. This implied, in his opinion, that the Dominions were prepared automatically to put their forces in time of war at the disposal of the Mother Country, and this was essentially a step which Canada was not yet prepared to take.

As regards the actual terms of the Declaration of London, he thought that they were a very great improvement on the existing condition of affairs, and that they should be accepted gladly.

Sir Joseph Ward [2] shared the views of Mr. Fisher as to the desirability of consulting all the Dominions with regard to treaties, and he explained at length the reasons which induced him to believe that the Declaration of London was in every respect an admirable arrangement.

Dr. Findlay [3] also, as a lawyer, explained in detail his conviction of the great merits of the Declaration as an attempt to settle many vexed questions of international law.

On the resumption of the discussion of the Declaration of London on June 2, General Botha [4] expressed his view that it was in the highest interests of the Empire that the Imperial Government should not definitely bind itself to any agreement with a foreign country which might affect a particular Dominion without first consulting that Dominion. South Africa had no grievance in the past on this head, but he

[1] Cd. 5745, pp. 116, 117.
[2] Ibid., pp. 118, 119.
[3] Ibid., pp. 120 seq.
[4] Ibid., pp. 125–9.

claimed this to be a sound principle in the interests of the Empire. The Declaration itself he thought an advance upon the existing position, and he held that the balance of advantage was clearly in favour of ratification.

Sir Edward Morris,[1] on behalf of Newfoundland, similarly welcomed the readiness of the Imperial Government to accept for the future the principle of consultation, and he thought that the creation of an International Prize Court and the definition of its sphere of operations by the Declaration were of great value.

Mr. Fisher [2] then expressed his readiness to move a new resolution in place of that which he had brought forward. The new resolution, which was drafted in consultation with the Imperial Government, ran :—

That this Conference, after hearing the Secretary of State for Foreign Affairs, cordially welcomes [3] the proposal of the Imperial Government, viz. :

(*a*) That the Dominions shall be afforded an opportunity of consultation when framing the instructions to be given to British delegates at future meetings of the Hague Conference, and that Conventions affecting the Dominions provisionally assented to at that Conference shall be circulated among the Dominion Governments for their consideration ; and

(*b*) That a similar procedure, when time and opportunity and the subject-matter permit, shall as far as possible be used when preparing instructions for negotiation of other international agreements affecting the Dominions.

This resolution was unanimously accepted, the qualification under the second head being sufficient to remove the objections felt by Sir Wilfrid Laurier to any system under which the Dominions should claim an absolute right of being consulted as to international treaties, thus bringing upon themselves the corresponding absolute obligation to take active part in British wars.

Sir Joseph Ward [4] then suggested that the Conference ought to pass a resolution in favour of the ratification of the

[1] Cd. 5745, pp. 129, 130. [2] Ibid., pp. 130 seq.

[3] A phrase suggested by Sir E. Morris as more appropriate than 'concurs'.

[4] Cd. 5745, p. 132.

Declaration, and Mr. Asquith [1] explained that the Government would attach considerable importance to the passing of such a resolution. The Declaration was a tremendous step in advance. It laid down a code of international law, and it set up an International Court which might be trusted to act impartially in the administration of the code. Nor by the ratification of the Declaration would the Imperial Government prejudice their position with regard to obtaining further improvements in the state of international law in due course.

Mr. Fisher, however, was not prepared to approve wholly of the Declaration. It would be wrong indeed to abandon such a great step in advance, and while under the circumstances the Government of the Commonwealth could not give their full approval, they would go so far as not to oppose the resolution, which was then passed, the Commonwealth of Australia abstaining from the vote.[2]

The remainder of the morning session of June 2 was occupied in a discussion of commercial relations and British shipping.

Mr. Pearce,[3] on behalf of the Commonwealth, reminded the Conference of the fierceness of the competition which British shipping had to undergo at the hands of subsidized foreign shipping which was available for use in time of war by the foreign Governments which subsidized it. To give an advantage to British shipping the Commonwealth Government in 1906 had proposed to give a preference of 5 per cent. to British goods carried by British ships, manned by white labour, but the Bill had been reserved on the ground that the proposal conflicted with treaties between the United Kingdom and foreign countries. Mr. Pearce urged that these treaties, which were not, he understood, of much importance, should be denounced in so far at any rate as they affected the Dominions and prevented action in favour of British shipping. He admitted that in this case the condition of manning by white labour had caused a further difficulty, but that was not the ground on which the matter had broken down,

[1] Cd. 5745, pp. 132, 133. [2] Ibid., pp. 133, 134.

[3] Ibid., pp. 134–6; cf. Mr. Glynn in Commonwealth *Parliamentary Debates*, 1911, pp. 172 seq.

and the question might be discussed quite apart from the general policy of the British Government in eking out even-handed treatment to all sections of the population of the Empire whether white or coloured.

In replying for the Board of Trade Mr. Buxton [1] expressed the appreciation of the Imperial Government of the desire of the Commonwealth Government to assist British shipping, but the matter had to be considered in connexion with British shipping all over the world, and it was not merely a question of denouncing treaties, but of the effect of such denunciation on trade elsewhere.

Sir Wilfrid Laurier [2] took up the treaty question in connexion with the position of Canada in the most-favoured-nation treaties, which compelled Canada to concede to some twelve countries the same advantages which it had given to the United States and to France. He proposed at a later date to move a resolution requesting His Majesty's Government to open negotiations with the several foreign Governments having treaties which applied to the overseas Dominions, with a view to securing liberty for any of those Dominions which might so desire to withdraw from the operation of the treaty without impairing the treaty in respect to the rest of the Empire.

Sir Joseph Ward [3] thought it advisable that every assistance should be given to British shipping as against heavily subsidized foreign shipping, but he deferred an opinion on the treaty question pending Sir Wilfrid Laurier's explanation of his resolution, and he also deferred for the fuller discussion as regards navigation, on June 19, the question of the employment of coloured seamen on British ships.

On the resumption of the treaty discussion on June 16, little difficulty was found in arriving at an agreement. Sir W. Laurier [4] pressed for the removal if possible of the

[1] Cd. 5745, pp. 136–8. [2] Ibid., pp. 138, 139. [3] Ibid., pp. 139 seq.

[4] Ibid., pp. 334–6, where Sir Wilfrid answered the arguments adduced in *The Times* of June 7, 1911, that his new proposals involved a breach of the commercial unity of the Empire, by insisting that, with different fiscal systems in every part, no such unity was possible or actual. Cf. p. 1153.

obligations of old treaties; he recognized that the Government in commercial treaties never now bound the Dominions without consultation, and that the old treaties were historical relics, but he asked for their alteration, if possible, in the interest of the Dominions, just as the German and Belgian treaties had been got rid of. The other ministers concurred, and Sir E. Grey [1] at once readily accepted the proposal, which was in harmony with the modern view of the treaty power as it affected the Dominions, but as there might be difficulties in the process, he explained that if any Powers declined to permit the separate withdrawal of the Dominions, the Government would endeavour to negotiate new treaties with the usual separate adherence and withdrawal clauses, on the understanding that the old treaties would be abrogated by the new, but without denouncing the old treaties until new treaties had been agreed upon. If the Powers refused to accept the proposals, the matter could stand over for the next Imperial Conference to consider.

(c) *British Shipping and British Indians*

On June 2, after the discussion of navigation law and treaties, Mr. Fisher [2] moved the resolution of the Government of Australia in favour of uniformity in the treatment of British shipping. Mr. Pearce,[3] on behalf of the Commonwealth Government, took exception to the control by the Imperial Government of merchant shipping legislation in the Dominions. He held that the Board of Trade should not take exception to Dominion legislation before it had actually become law, and he maintained that the Government of Australia had no desire to interfere unfairly with British shipping, but were merely anxious to see that British ships did not compete unfairly with Australian vessels.

Sir Joseph Ward,[4] on the other hand, thought that it was perfectly fair that the Imperial Government should call the attention of the Dominions to questions of merchant shipping

[1] Cd. 5745, pp. 336–8; *House of Commons Debates*, xxx. 703, 704.
[2] Ibid., p. 143. [3] Ibid., pp. 144, 145. [4] Ibid., p. 149.

in advance. If this were done it prevented needless misunderstanding and friction.

Mr. Brodeur,[1] on behalf of Canada, was inclined to think that the position of Canada had been prejudiced since 1867 by the passing of the *Merchant Shipping Act* of 1894, and he urged that the Imperial Government should not interfere with the action of the Dominion as regards merchant shipping.

In reply, Mr. Harcourt[2] pointed out that the plan of giving notice of points with regard to merchant shipping was done under the impression that it was an advantage to the Dominion Governments to know at the earliest possible moment the views of the Imperial Government, and Mr. Buxton[3] emphasized the duty of the Board of Trade to consider and make representations with regard to the interests of the whole trade of the United Kingdom. With regard to Mr. Brodeur's objection, he pointed out that the Act of 1894 was merely a consolidating Act, and that its enactment imposed no new restriction on or interference with Canadian merchant-shipping legislation.

The discussion ended with a formal passing of the resolution :—

> That it is desirable that the attention of the Government of the United Kingdom and of the Dominions should be drawn to the desirability of taking all practical steps to secure uniformity of treatment to British shipping, to prevent unfair competition with British ships by foreign subsidized ships, to secure to British ships equal trading advantages with foreign ships, and to raise the status and improve the conditions of seamen employed on such ships.

On June 19 the question of the grant of wider legislative powers to the Dominions in merchant shipping was inaugurated by a statement by Lord Crewe[4] as Secretary of State for India, with regard to the question of the British Indian. He recognized the impracticability of the ideal of free movement throughout the Empire for all British subjects ; the Dominions must decide for themselves whom they would

[1] Cd. 5745, pp. 148, 149.
[2] Ibid., p. 145.
[3] Ibid., pp. 145, 146.
[4] Ibid., pp. 396–400.

admit, and he recognized the force both of the racial and the economic objections. The racial feeling as such was partly mental and partly physiological: its existence could not be denied if it could not be explained. But he emphasized the fact that in most respects the less a white man has individually to be proud of, the prouder he is apt to be of his whiteness, and the more he considers himself entitled to look down upon people of a coloured race. He reminded his audience of the great traditions of India, and of the intellectual and religious greatness of the Indian people, and he laid stress on the loyalty of India. What was needed was a more sympathetic understanding; he would try to explain to India the position of the Dominions, and he asked the Dominions to consider the position of India. The unsatisfactory treatment of Indians in the Dominions was a constant source of difficulty, all the more formidable as self-government in India proceeded.

Lord Crewe therefore asked that, while restricting immigration, the entrance of non-immigrant Indians should be facilitated and freed of difficulties, and that when Indians were lawfully domiciled (as in one Dominion for over two hundred years) all care should be taken to respect their caste feelings, as, for example, in connexion with prison treatment. A really united Empire could not exist so long as India and the Dominions were at variance, and the Mother Country was involved in the disputes.

Sir J. Ward [1] at once expressed his sympathy with India, but defended his desire to stop the competition of Lascar crews on vessels trading between Australia and New Zealand on economic and social grounds. The competition of such crews was ruining the lines which employed well-paid white labour, and those lines could not continue unless the laws regulating the payment of labour were repealed or they were allowed to evade those laws by registration elsewhere; neither of these alternatives was possible, and the Government of New Zealand must endeavour to save the white crews. His Shipping Bill [2] indeed penalized by a 25 per cent. tax

[1] Cd. 5745, pp. 399 seq. [2] Above, pp. 1211–5.

the bills of lading and passenger tickets of vessels which had coloured persons in the crew, but the penalty was void if the seamen were paid the rates of wages current in New Zealand, and that proposal was fair and proper. While recognizing the rights of domiciled Indians, he asserted the principle that every race should be relegated to its own zone, though he did not move it as a separate resolution.[1] The policy was essential for the future good of the Empire, and the Japanese already forbade any Japanese subject to be naturalized in a foreign country.

Dr. Findlay [2] emphasized the economic side of the problem, comparing it with the exclusion by high duties of cheap goods from India which New Zealand enforced, and pointed out that the *status quo* had been one of the employment of white labour.

Sir W. Laurier [3] supported the resolution for wider powers, but asserted that in his view the Dominion already had plenary powers, but was subject to the royal veto, which the Imperial Government used freely in shipping matters only. As to Indian immigration he felt the economic difficulties, and could not encourage it. As to the treatment of domiciled Indians, they had all the rights of British subjects which were inherent in such subjects ; if in British Columbia they had not the franchise, neither had women in England. In the future, if the economic difficulty disappeared no trouble would exist.

Mr. Batchelor [4] asserted that prejudice was disappearing in Australia, and subject to the exclusion policy, which was unalterable, they were anxious to grant free entry to visitors, for which purpose the permit system existed, and to treat residents on the same footing as other persons, e. g. as regards old-age pensions.

Mr. Pearce [5] explained that racial distinctions in regard to pearl contracts and subsidies in Pacific Island trade were due to deliberate policy, as sailors were needed for war purposes. As regards general legislation, authority was

[1] Cd. 5745, pp. 403, 404 ; cf. p. 279. Is New Zealand to be Maori ?
[2] Ibid., pp. 405, 406.
[3] Ibid., pp. 406–8.
[4] Ibid., pp. 408, 409.
[5] Ibid., p. 409.

only sought by the Commonwealth Parliament to secure that local vessels were not subjected to conditions which were not imposed on Imperial and foreign ships.

Mr. Malan [1] pointed out that in South Africa the objections to Indian immigration were based on the fact that there was already a large resident African population ; the problem of dealing with that question was already very serious, and will be greatly complicated by the addition of an Indian population. There were, however, also economic difficulties, inasmuch as in Natal Indian labour was desired for work on the sugar plantations.

Lord Crewe [2] replied briefly to Sir Joseph Ward's arguments. He pointed out that, regarded from an economic point of view, it was difficult to criticize the Indians for having a different standard of living from white people, and to equalize economic conditions would be very difficult. Indians could not be expected to appreciate the exact point of view of New Zealand.

The more general aspect of merchant shipping was dealt with by Mr. Buxton.[3] He insisted that the principle was that the merchant shipping generally should be regulated by the Imperial Government, subject to the control by the Colonial Parliaments of registered shipping and the coasting trade, and to the extent of control in the case of Australia of vessels on round voyages conferred by s. 5 of the *Constitution Act*, 1900.

The New Zealand proposal was apparently that in territorial waters the Colonial Parliament could regulate matters like wages, manning scale, accommodation, and so forth. It might be possible to insist on the payment of New Zealand rates of wages within territorial waters, but it would be very difficult to insist on the application of the New Zealand manning scale and of the New Zealand ideas of accommodation.

In the case of foreign ships attempts to enforce these rules would be illusory ; foreign vessels outside territorial waters could deduct the excess of wages paid, could re-convert the accommodation and could dismiss at the next port the

[1] Cd. 5745, pp. 409, 412.
[2] Ibid., pp. 410, 411.
[3] Ibid., pp. 412–6. See above, Part V, chap. vii.

additional men shipped. The British ship would not be in a position to do so, and thus British shipping would be at a disadvantage as compared with foreign shipping, which was no doubt not the desire of the Dominion. He considered, therefore, that it was impossible to alter the existing arrangement, and he reminded the Conference that British shipping was subject to retaliation from foreign Powers if New Zealand imposed upon such shipping her own conditions. The rule was that no country imposed on ships of another country her own conditions as to wages, manning, or accommodation, but merely took precautions to prevent unseaworthy ships sailing from her ports.

In conclusion, Mr. Buxton suggested that the question was one which might engage the attention of the Royal Commission which by another resolution it had been agreed to set up, to examine into the commercial relations of the Empire, and he asked Sir J. Ward if he could not see his way to withdraw his resolution on that ground. Sir J. Ward[1] in reply recapitulated the legal position, pointing out that the *Merchant Shipping Act*, 1894, ruled the situation, and that under its terms (ss. 735 and 736) the Dominions could only regulate coasting trade and registered ships, and in each case subject to the royal assent being obtained before the enactment took effect. The law forbade effective action against those vessels which carried Lascar crews, and it was an economic question. They had tried similarly to impose their rates on vessels which came from elsewhere paying lower wages, a reference to the attempts to enforce the New Zealand conditions on the Australian vessels of Messrs. Huddart, Parker & Co. The position was too serious to permit of the withdrawal of the resolution. Sir Wilfrid Laurier[2] then proceeded to support the resolution, but he argued in the style of Sir John Thompson, that the *British*

[1] Cd. 5745, pp. 416–8.

[2] Ibid., pp. 418, 419. The argument is not tenable, for after 1867 Acts cc. 128 and 129 of 1873 respecting registered shipping expressly proceeded on the power given by s. 547 of the Imperial Act 17 & 18 Vict. c. 104; and in the face of this admission argument is useless. Cf. also 7 & 8 Edw. VII. c. 64, which recognizes the effect of s. 736 of 57 & 58 Vict. c. 60.

North America Act, 1894, gave the Dominion Parliament full legislative powers, and that only a formal alteration of that Act would enable the powers to be overridden. In any event he wished the position cleared up. His views were reinforced by Mr. Brodeur,[1] who insisted that the Act of 1894 had altered Canadian law.[2] Mr. Buxton[3] insisted that the Act was merely intended to consolidate, and that any alteration was merely accidental. Besides, he expressed his readiness to meet the views of the Dominion by securing the royal approval to the proposal in a Bill of 1911 to validate as regards Canadian registered shipping the deviation between Canadian and British law. Mr. Fisher[3] finally decided not to vote for the motion, lest he be deemed to admit that the Commonwealth had not all the powers which it desired to have, but Sir J. Ward intimated pretty plainly that the Commonwealth was really no better off in this regard than the Dominion. Mr. Malan[4] and General Botha[5] also thought that matters were quite satisfactory, and that

[1] Cd. 5745, p. 419. He admitted the binding force of the Act of 1894.

[2] The reference seems to be to two facts: (*a*) s. 69 of the Imperial *Merchant Shipping Act*, 1906, altered the measurement of vessels for limitation of compensation by substituting for gross tonnage without deduction of engine-room space, registered tonnage plus the amount deducted for engine-room in arriving at the registered tonnage; (*b*) the Act of 1894 makes the effect of any breach of collision rules conclusive proof of default on the part of a vessel in collision, while the older Act of 1854, which was followed by Canadian law (first in 1880 by c. 29, and now in the *Shipping Act*, 1906), made the breach of rules merely proof of default if the accident arose from the breach. Cf. *China Merchants' Steam Navigation Co.* v. *Bignold*, 7 App. Cas. 512; *The Khedive*, 5 App. Cas. 486. In both cases it seems to me that the Canadian law was overridden, but it was a case where the Canadian law never had any validity as repugnant to 36 & 37 Vict. c. 85, s. 17 (overlooked in 1880 by Canada). The saving in s. 421 of the *Merchant Shipping Act*, 1894, refers to collision rules, not to the rules regarding the effect of disregard of rules, and still less to the rules regarding limitation of liability which occur in a different part of the Imperial Act, though in the same part of the Canadian Act as the collision rules. It should be noted that the Supreme Court of Canada has upheld the validity of the Canadian *Shipping Act*, but the point of repugnancy was not taken in the case in question; see *The Ship 'Cuba'* v. *McMillan*, 26 S. C. R. 651; above p. 716, note 1.

[3] Ibid., pp. 422, 423.

[4] Ibid., p. 423.

[5] Ibid.

the Union had full powers. The resolution in favour of an extension of the legislative power of the Dominions was passed therefore only by New Zealand and Canada, and the Imperial Government made no pledge that it could do anything substantial to comply with the wishes of the Dominions in this regard.

(*d*) *The Imperial Court of Appeal*

On June 12 the important question before the Conference was that of the Imperial Court of Appeal, resolutions having been proposed by the Commonwealth of Australia in favour of the transfer to an Imperial Appeal Court of the powers exercised by the House of Lords in respect of appeals from the United Kingdom Courts and the powers exercised by the Judicial Committee of the Privy Council; and by the Government of New Zealand, that no Imperial Court of Appeal could be satisfactory which did not include judicial representatives of the overseas Dominions in view of the diversity of laws enacted, and the differing public policies affecting legal interpretation in those Dominions. In support of the resolution of the Commonwealth, Mr. Batchelor [1] thought that it was anomalous to have two final Courts of Appeal, that the existence of two such Courts gave a possibility of conflicting judgements, while the similarity of the personnel of the Courts was an argument in favour of their merger. He criticized also the system under which the members of the Judicial Committee did not give individual judgements, and he much preferred the system by which individual judgements were given. Lord Loreburn [2] then explained the nature of the existing Courts and their jurisdiction. The House of Lords comprised the Lord Chancellor, the four Lords of Appeal with any previous Chancellor, and any Peer who had held high judicial office, and it heard all the appeals from the United Kingdom. Three members formed a quorum, but the Court usually sat with at least four. The Judicial Committee had heard all the appeals from Colonial and Dominion Courts, from the Channel Islands, the Isle

[1] Cd. 5745, pp. 214–6.

[2] Ibid., pp. 216 seq.

of Man, from certain Consular Courts, and the United Kingdom Ecclesiastical Courts. The cases which came before it might involve old French law, Roman Dutch law, the English common law, modified variously by statute in the several Dominions, and the Indian codes, and it was necessary, therefore, to adjust the character of the tribunal to the different classes of cases with which it had to deal. The Judicial Committee included the Lord Chancellor, the four Lords of Appeal, all Privy Councillors who had held high judicial office, two judges with special knowledge of Indian law, and judges not exceeding five in number from the Dominions. In practice the members of the House of Lords and the Judicial Committee were almost identical, and whenever a division of judges between the Courts had to be made he carried out the division himself, and took special care to secure that both Courts were strongly manned. There had never been any difference of decision between the two Courts,[1] although there had been differences of dicta, but such a difference took place between the dicta of members of the House of Lords themselves.

Lord Loreburn was of opinion that it would be better if the House of Lords, like the Judicial Committee, delivered but one judgement, but he recognized that a change in the practice of the House of Lords was not possible, and he intimated that if the Dominions preferred that the practice of the Privy Council should be based on that of the House of Lords there would be no difficulty in making the alterations. Moreover, he was quite prepared that the Final Court of Appeal for the Dominions should be constituted in such manner as each Dominion preferred for itself. Did the Dominions desire that Indian judges should sit on appeals from the Dominions ? Did they desire that a permanent judge should come from each Dominion to deal with all the appeals or only with the appeals from that Dominion ? It could always be arranged to take all cases from one Dominion at such period as would permit the attendance of a judge

[1] The Court of Appeal and the Judicial Committee have in effect disagreed : see Clark, *Australian Constitutional Law*, pp. 349 seq.

from that Dominion. With regard to the United Kingdom the Government were not prepared to make a change in the composition of the House of Lords, which already included one distinguished judge from the Dominions, Lord de Villiers. He suggested that two English judges of the highest quality should be added both to the House of Lords and to the Judicial Committee, that the quorum of both Courts should be fixed at five instead of three as at present, and that the Court should sit successively in the House of Lords for United Kingdom appeals, and in the Privy Council for appeals from the Dominions and Colonies. It would thus be in effect a single Court sitting in two divisions, but the old name would be kept.

Sir Joseph Ward [1] expressed his preference for a system by which the Judicial Committee should be strengthened by the addition of a permanent judge from each of the self-governing Dominions who should take part in the hearing of all cases from the Dominions, and not merely of cases coming from the Dominion in which he was a judge. It would be well worth, in his opinion, the cost to the Dominion of paying their judge, for he would be able to inform the Court on many matters which it might not otherwise have satisfactorily before it. The native land cases which affected New Zealand were of the highest consequence to the Dominion, for 7,000,000 acres of land were in the hands of some 47,000 Maoris, and it was of such moment that cases which affected those lands—and such cases must arise frequently—should be rightly decided that the payment for a judge was comparatively of no importance.

But Sir Joseph Ward's proposal was not acceptable to the rest of the members of the Conference. Mr. Brodeur [2] stated that the existing system worked satisfactorily, that the Provinces of Canada were concerned in the matter, and would resent if anything were decided without their consent, and accordingly it would be well if matters could be left as they were. Mr. Fisher [3] thought that appeals from Australia should be decided in Australia, but he recognized that that

[1] Cd. 5745, pp. 224 seq. Cf. Dr. Findlay, at pp. 237–9.
[2] Ibid., pp. 239 seq. [3] Ibid., p. 245.

could not be done without an amendment of the Constitution, and he was not prepared for an Australian judge to be sent home to sit on the Judicial Committee. Mr. Malan[1] emphasized the fact that under the *South Africa Act*, 1909, appeals lay only by special leave, and that accordingly appeals would be very rare, and the Government of the Union would not be prepared under these circumstances to send a man home to sit on the committee. Sir Edward Morris[2] stated that Newfoundland was perfectly satisfied with matters as they stood, and that they could not go to the expense of providing a judge.

The Conference accordingly accepted a resolution substituted by Mr. Fisher for his original resolution, to the effect that, having heard the views of the Lord Chancellor and Lord Haldane, the Conference recommended that the proposals of the Government of the United Kingdom should be embodied in a communication to be sent as soon as possible to the Dominion Governments, and Mr. Asquith laid stress on the offer made by the Lord Chancellor that cases from the Dominions should be grouped together so as to permit of their all being dealt with with the assistance of a judge from the Dominion itself under the Act of 1908, an arrangement which he thought would meet the desire of the Government of New Zealand that a New Zealand judge should sit in cases concerning Maori lands.

The memorandum[3] circulated as the outcome of the discussion contained nothing new. The Imperial Court of Appeal will consist of two divisions, the House of Lords, and the Privy Council. It will consist of practically the same members varied to suit the cases they have to deal with, and it will receive additional strength through the addition of two judges. The decisions of the Judicial Committee will as hitherto be issued as one decision, but dissenting judges may intimate the grounds of dissent.

[1] Cd. 5745, pp. 231, 232, 245. [2] Ibid., p. 239.

[3] See *Parl. Pap.*, Cd. 5746–1, p. 236; for the Bill, see *House of Lords Debates*, ix. 1130–2. It is condemned by Mr. Glynn, Commonwealth *Parliamentary Debates*, 1911, p. 178.

(e) *Naturalization*

On June 13 there came before the Conference the important question of naturalization, and the Conference were able to arrive at a positive result of Imperial importance. Mr. Batchelor [1] who moved the resolution of the Government of Australia in favour of a system which, while recognizing the right of each Dominion to provide for local naturalization, should permit the issue to persons fulfilling prescribed conditions of certificates of naturalization effective throughout the Empire, urged that it was quite impossible to secure uniformity in the conditions of naturalization throughout the Empire, but that it would be well worth while to set up a standard embodying the most drastic conditions, and to give Imperial certificates of naturalization to persons who would comply with such a standard.

Sir Wilfrid Laurier [2] also agreed that there was no possibility of securing uniform conditions of naturalization, but he laid down the principle that a man who was a British subject anywhere should be a British subject throughout the Empire. One hundred thousand Americans annually emigrated to Canada. They sought at the earliest possible moment—that is, after three years' residence—naturalization, and they obtained it in Canada, but whenever they left Canada they ceased to be British subjects. The principle should be adopted that there should be uniformity in the effect of naturalization wherever granted, and that a man who was a British subject anywhere should be recognized as a British subject everywhere. This was perfectly compatible with diversity of methods as to the manner of granting naturalization. Sir Joseph Ward [3] was prepared to accept this principle on the understanding that each Dominion would preserve its rights for the exclusion of aliens and Asiatics. Mr. Malan [4] objected strongly to the proposal that there should be two kinds of naturalization certificates—

[1] *Parl. Pap.*, Cd. 5745, pp. 249–51. Cf. Cd. 5746–1, pp. 237 seq.; above, pp. 1323, 1324.

[2] Ibid., pp. 251–3—an admirable and lucid presentment of an irresistible case. [3] Ibid., pp. 253–5. [4] Ibid., pp. 255, 256.

one Imperial and one limited to the Dominions—but he accepted fully that a British subject anywhere should be a British subject everywhere, as laid down by Sir Wilfrid Laurier. The Imperial Government were not, however, able to accept the proposal as it stood.[1] They laid stress on the period of five years which was required as a condition of naturalization in this country, and they felt that the road to British citizenship should not be made too easy. They recognized also in the fullest manner that there must be divergent conditions of naturalization in the several Dominions, and to obtain an Imperial naturalization it would be necessary to have two standards. They suggested, therefore, that it should be open to any person who had obtained a certificate of local naturalization in any of the Dominions, and who had in addition resided for five years in any part of the Empire, to apply for a certificate of Imperial naturalization. The application would be made through the responsible minister of the Dominion in which the applicant resided, and if he endorsed the application, the certificate would be issued by the Governor-General or Governor. No doubt it would be possible that under this system a man who had been refused a local certificate in one Dominion might go to another Dominion and obtain Imperial naturalization therein, but any ill result could be avoided by a Dominion refusing to recognize the naturalization of a man who had once been refused naturalization therein, and Mr. Churchill thought that the principles which he proposed might be accepted as adequate, and the Imperial Bill which had been prepared to deal with the question of naturalization should be re-drafted.

Sir Wilfrid Laurier regretted that the Imperial Government were not prepared to accept naturalization in any one of the Dominions as conferring British citizenship throughout the Empire, but he was prepared to accept the compromise as a substantial step in the right direction, and the Australian Government also concurred in the proposal. It was finally agreed therefore to accept the following principles :—

(1) Imperial nationality should be world-wide and uniform,

[1] *Parl. Pap.*, Cd. 5745, pp. 256–9.

each Dominion being left free to grant local nationality on such terms as its legislature should think fit.

(2) The Mother Country finds it necessary to maintain five years as the qualifying period. This is a safeguard to the Dominions as well as to her, but five years anywhere in the Empire should be as good as five years in the United Kingdom.

(3) The grant of Imperial nationality is in every case discretionary, and this discretion should be exercised by those responsible in the area in which the applicant has spent the last twelve months.

(4) The Imperial Act should be so framed as to enable each self-governing Dominion to adopt it.

(5) Nothing now proposed would affect the validity and effectiveness of local laws regulating immigration or the like, or differentiating between classes of British subjects.

The Bill was accordingly at once re-drafted.[1]

(f) Commercial Relations[2] *and (g) the All-Red Route.*[3]

The non-political subjects must be considered briefly. Sir W. Laurier disposed of the vexed question of (*f*) commercial relations by moving a resolution which was accepted by the Imperial Government subject to a rider to safeguard the Imperial Government and the Dominions from being obliged to accept recommendations from the Commission as to tariff policy. As so amended the resolution (xx) runs :—

That His Majesty should be approached with a view to the appointment of a Royal Commission representing the United Kingdom, Canada, Australia, New Zealand, South Africa, and Newfoundland, with a view of investigating and reporting upon the natural resources of each part of the Empire represented at the Conference, the development attained and attainable, and the facilities for production, manufacture, and distribution ; the trade of each part with the others and with the outside world, the food and raw material requirements of each and the sources thereof available, to what extent, if any, the trade between each of the different parts has been affected by existing legislation in each, either

[1] *Parl. Pap.*, Cd. 5746–1, pp. 253 seq.

[2] *Parl. Pap.*, Cd. 5745, pp. 339–41.

[3] Ibid., pp. 344–58.

beneficially or otherwise, and by what methods consistent with the existing fixed policy of each part the trade of each part with the other may be improved and extended.

A rider to this resolution in effect is that (xxi)[1] on (*g*) the All-Red Route, which runs :—

That in the interests of the Empire it is desirable that Great Britain should be connected with Canada and Newfoundland, and through Canada with Australia and New Zealand, by the best mail service available,

for it was agreed that in view of the impossibility of Australia co-operating in any existing scheme, the matter could well be discussed by the Royal Commission.

(*h*) *Emigration and Labour Exchanges*

On June 9 the question of Emigration[1] was discussed, and Mr. Burns was present to represent the Local Government Board. Mr. Fisher formally moved the re-affirmation of the resolution of the Conference of 1907, that it was desirable to encourage British emigrants to proceed to British Colonies rather than to foreign countries ; that the Imperial Government be requested to co-operate with any Colonies desiring immigrants in assisting suitable persons to emigrate, and that representatives of the Dominions be nominated to the Committee of the Emigrants' Information Office. Mr. Batchelor supported the resolution, and Sir Joseph Ward was also in favour of it, while Mr. Malan, on behalf of South Africa, and Sir Edward Morris, on behalf of Newfoundland, were ready to support it. Mr. Burns, in reply, laid before the Conference a series of figures indicating in the most interesting manner the great change which had taken place in the nature of emigration in the last ten years. In 1900 the percentage of emigrants from the United Kingdom who went to parts of the British Empire was only 33 per cent. ; in 1906 it had risen to 54 per cent. ; in 1910 to 68 per cent., and in the first four months of 1911 the proportion had risen to nearly 80 per cent. Moreover, the numbers were very large ; in 1911 the total emigration would probably amount to 300,000,

[1] Cd. 5745, pp. 198–206 ; 5746-I, pp. 216–23.

which would appropriate 60 per cent. of the natural increase of the population of the United Kingdom, as compared with 48 per cent. in 1910 and 50 per cent. in 1907. But for the saving in life represented by a lower death-rate and a much lower infant mortality, this emigration would be a very heavy drain on the United Kingdom. The increase of population in ten years in Scotland and Ireland was only 210,000, or less than the total emigration from Great Britain for one year. With a diminishing birth-rate the United Kingdom could not safely spare more than 300,000 people a year, and if 80 per cent. of these went to different parts of the Empire the Conference would probably agree that this was as much as could reasonably be required. Since 1907 the work of the Emigration Office had more than doubled, and every effort was made to keep the machinery up to modern requirements. Over-organization would probably check the operations of many of the voluntary non-political and benevolent associations connected with the work. Information was disseminated through 1,000 public libraries and municipal buildings, in addition to many post offices; 650 Boards of Guardians sent all their emigrated children to the Dominions, and in twenty-one years, at a cost to the rates of £109,000, 9,300 poor-law children had been emigrated, and there was convincing evidence of the high quality of such children. In five years, at a cost of £127,000, 130 Distress Committees had sent 16,000 emigrants to different parts of the Empire. Since 1907 army reservists had been allowed to leave this country and to continue to draw reserve pay, and since that date 8,000 reservists had availed themselves of this permission, of whom only 329 were not under the British flag. Mr. Burns[1] concluded with the advice to the Dominions to trust to the Imperial Government in this matter. She would hold the scales fairly between the various Dominions, and he was glad on his part to recognize that during the last two or three years the Dominions had shown greater generosity in the treatment of emigrants from the United Kingdom. After this statement there was little

[1] Cd. 5745, p. 202.

to be said. Sir Wilfrid Laurier said that matters appeared quite satisfactory. Mr. Batchelor[1] could only add that every effort to reduce the 20 per cent. of emigrants who went outside the Empire would be greatly appreciated, and Sir Joseph Ward[2] felt that if the Dominions received 80 per cent. of the emigrants it was as much as they could reasonably expect. He suggested that the resolution should be altered to express approval of the policy that was being pursued, and Mr. Harcourt suggested that the last paragraph, with regard to the appointment of representatives of the Dominions on the Emigrants' Information Office, should be omitted. He promised that the information issued by that office should be kept absolutely up to date, while, if representatives were introduced as suggested, there might be difficulty through competition between the representatives of the different Dominions and States. This proposal was agreed to, and finally the resolution was passed in the form, 'That the present policy of encouraging British emigrants to proceed to British Dominions rather than foreign countries be continued, and that full co-operation be accorded to any Dominions desiring emigrants.'

The difficulties of co-operation between Governments in emigration had been strikingly illustrated just a little earlier. At the afternoon session on June 2, Mr. Buxton[3] moved, on behalf of the Board of Trade, a resolution in favour of utilizing the machinery of the United Kingdom system of Labour Exchanges established in 1909 in connexion with the notification of vacancies for employment and applications of persons for employment as between the Dominions and the United Kingdom.

He explained that applications had been received from overseas employers for the services of persons to be obtained from this country, and it was thought that it might be possible to arrange for effective co-operation between the Dominion Governments and the Imperial Government, by requiring that employers in the Dominions should give

[1] Cd. 5745, p. 202. [2] Ibid., p. 203.

[3] Ibid., pp. 153 seq.; 5746–1, pp. 127–9.

notice to the Dominion Governments, who would pass on the applications to their agents in London, by whom in concert with the Labour Exchanges vacancies could suitably be filled. If necessary, the Imperial Government would be prepared to advance the cost of passages, provided the Dominion Governments were prepared to guarantee the refund.

The proposal, however, was not warmly received. Sir Wilfrid Laurier [1] did not look with favour on the direct promotion of emigration of this kind, whether from Great Britain or elsewhere. No matter how carefully guarded, it would probably lead to friction between employer and employee in Canada. The Canadian Manufacturers' Association had opened an office in London for the purpose of securing skilled labour, but they had found it unsuccessful and the office had been closed.

Mr. Batchelor,[2] on behalf of the Commonwealth, explained that, as the matter of selecting emigrants still rested with the Agents-General of the States, he had held a meeting with the Agents-General and had consulted them on the matter, but he found that they were adverse to the proposal. One great disadvantage was the question of time ; to communicate the wants of employers, to select and dispatch the men, would take probably six months, and by that time the conditions of the labour market might have entirely changed, and the State Governments would certainly be reluctant to depart from the principle of having complete control of the selection of assisted emigrants. Moreover, experience showed that to obtain a refund of passage money was very difficult, but he had no objection to the proposal being further considered by a sub-committee.

Sir Joseph Ward [3] was of opinion that some use could be made of the agency ; the New Zealand Government most carefully regulated immigration so as to secure that immigrants landed only at suitable seasons, and by a system of Labour Exchanges which had been in force since 1894 they

[1] Cd. 5745, pp. 154, 155.
[2] Ibid., pp. 155–7.
[3] Ibid., pp. 157–9.

effectively prevented a congestion of labour. The matter might be arranged between the High Commissioner and the Labour Exchanges.

General Botha[1] was prepared to assist agriculturists, but he did not think that the Labour Exchanges could be used for this purpose.

Mr. Buxton then said that there was no intention on the part of the Imperial Government to press the resolution on the Conference if it were not generally acceptable. He had put down the motion in order to initiate a discussion and to show that the Home Government were willing to co-operate. The idea was to secure that very selection to which reference had been made, and this would be carried out if the Dominion Governments co-operated with the Labour Exchanges. He would withdraw his resolution, and the Board of Trade would be ready to discuss the question with any of the Dominions who thought that the Labour Exchanges could render assistance.

(*i*) *Postal and Telegraph Reforms*

New Zealand as usual took the lead in proposals for postal and telegraph reform, but Great Britain received a favourable vote for the extension to Australia and the development in Canada of the Imperial Postal Order system,[2] which was highly praised by both South Africa and New Zealand. Further cheapening of cable rates[3] was promised by the Postmaster-General, who explained that deferred telegrams in plain language would soon be sent over the system to Australia at half rates, and also promised reductions in press rates by pressure on the companies. He also explained that by means of the control of landing licences he hoped to secure a control of telegraph rates, which would enable him to regulate rates subject to decision in case of disagreement by the Railway and Canal Commission. But the Imperial Government could not accept the Australian proposals either for a new Atlantic cable[4] or the purchase of a land line across Canada; as against the cheerful

[1] Cd. 5745, p. 159.
[2] Ibid., pp. 323–5.
[3] Ibid., pp. 281–91.
[4] Ibid., pp. 291–307.

optimism of Mr. Pearce as to extra trade, they feared a heavy additional loss on the Pacific cable, and a line to Canada could not receive sufficient business to render it profitable. On the other hand, the Imperial Government developed a practical scheme of wireless telegraphy,[1] including the construction of a series of high power stations beginning in England, then in Cyprus, Aden, Bombay, Straits, and Western Australia, thence to New Zealand by land line and cable or wireless telegraphy.[2] This was accepted by Australia and New Zealand, and welcomed by South Africa as a preliminary to an extension to that Union via East or West Africa.

As regards universal penny postage [3] the Imperial Government were unable to accept the proposal in its full extent, as the loss would be very heavy and would not be made up by the increased number of letters sent, since the expense of handling long-distance letters and the reply was over $1\frac{1}{2}d.$ There was a loss, though a diminishing one, on the penny inter-Imperial postage, and there was a loss which was being gradually diminished, and would in thirteen years disappear, on the penny post to America. Moreover, practically no foreign country was willing to face the loss, and therefore only a general resolution in favour of the reduction of postage could be carried, New Zealand declaring her intention of continuing her individual efforts at introducing at least a unilateral penny postage, and Australia [4] declaring for reciprocity.

[1] Cd. 5745, pp. 323–32.

[2] The existence of wireless telegraphy between Australia and New Zealand is already assured by the erection of stations with 1250 miles day radius in New Zealand and Australia, while Fiji is to be connected with the Solomon Islands, Ocean Island, and the New Hebrides by wireless telegraphy. The cost of the Straits station was to be divided between Great Britain, Australia, and New Zealand, and the details to be settled by a committee with representatives of either Dominion.

[3] Ibid., pp. 315–23.

[4] In Australia penny postage with the Empire dates only from 1911.

(*j*) *Income Tax and Death Duties*

On these heads no progress could be effected. The Imperial Exchequer was not in a position to sacrifice the revenue derived from double income-tax,[1] and Mr. Lloyd George pointed out that there could be no real reciprocity, as Great Britain lent money largely and the Dominions did not, so that the Dominions alone would gain by the principle of allowing the duty to be charged only in the Dominions. Mr. Lloyd George, however, promised to see whether the same rule as to death duties could be adopted and a deduction made of the part charged in the Dominions, but this proved impracticable. Nor on administrative grounds could he see his way to alter the rule of the *Finance Act*, 1910, under which residents in the Colonies could not obtain exception on dividends from British securities.

As regards death duties it was not possible to find a solution of the difficulty as to the locality of assets. The Imperial Government could not accept the South African view under which the assets are situated where the company operates, and unless that view is abandoned, s. 20 of the *Finance Act*, 1894, cannot be applied.[2]

(*k*) *Coinage and Weights and Measures*

Mr. Batchelor [3] moved on June 2, on behalf of the Commonwealth Government, their resolution in favour of the reform of the system of weights and measures and coins. He explained that the Commonwealth were prepared to adopt the metric system, but they could not usefully do so unless Great Britain and New Zealand also adopted it, and if the

[1] Cd. 5745, pp. 358–64; 5746–1, pp. 266–70.

[2] General Botha (pp. 364 seq.) pressed that incorporation should be the test of *locus* of shares in any company, and he also intimated that, if they so desired, the Union Parliament could prevent (no doubt by requiring all transfers to be local) shares in companies registered in South Africa being situate in law in the United Kingdom. Mr. Malan (p. 367) suggested that in any case deduction of the Colonial duties be allowed, but Mr. George was not favourable.

[3] Ibid., pp. 165, 166.

Imperial Government were anxious to make the change the passing of such a resolution might strengthen their hands.

Mr. Buxton,[1] on behalf of the Home Government, could not support the resolution because he could not undertake that the reform would be carried out. If they had a clean slate the decimal system of coinage and the metric system of weights and measures could advantageously be adopted, but this was not the case, and the House of Commons had rejected the proposal to make it compulsory because trade, commerce, and domestic arrangements would be seriously upset.

He added in reply to Mr. Malan [2] that the foreign countries had not pressed for the change being made, and Sir Joseph Ward,[3] while agreeing with the theoretic merits of the metric and decimal systems, recognized that at present no change was practicable, and as Sir Edward Morris,[4] on behalf of Newfoundland, concurred in this view, Mr. Batchelor withdrew the resolution after he had suggested that the difficulty might be obviated if ten or fifteen years' notice was given of the intended change.

The subject of coinage was revived on June 16, when Sir J. Ward [5] took the opportunity of advocating, not the decimal system, but a system of interchange of coins, complaining of the disuse of the half-crown as legal tender in the Commonwealth, and the resulting loss to New Zealanders. The Australian representatives combated the assertion, but admitted that they omitted the coin from the new coinage with a view to approximating to a decimal system. Sir W. Laurier [6] reminded the Conference that Canada allowed British coins as legal tender, but said they were little used, and he advocated theoretically the decimal system as the only sensible one. Mr. Lloyd George [7] deprecated any kind of coinage reform in view of the conservatism of

[1] Cd. 5745, pp. 166, 167.
[2] Ibid., pp. 167, 168.
[3] Ibid., p. 168.
[4] Ibid., p. 168.
[5] Ibid., pp. 368, 369.
[6] Ibid., pp. 369, 370.
[7] Ibid., pp. 370, 371.

feeling in England on this topic, and pointed out that interchange of coinage would be confusing, and would also deprive each Dominion of its right to the profits on its silver coinage.

(*l*) *Shipping Conferences and Rebates*

The discussion of this topic was very long and important, but not of political consequence, as Mr. Buxton [1] at once declared that the policy of the South Africa decision to exclude from the mail contract lines which gave rebates or were members of a conference, and to penalize those lines in matters of harbour dues, &c., was not one with which His Majesty's Government claimed the right to interfere. Sir David de Villiers Graaff [2] made a very elaborate indictment of the South African shipping ring, and Sir J. Ward [3] sympathized, but differed from the general attack made by Sir David on rebates, as rebates (not deferred rebates) were essential to secure a cheap service of steamers with refrigeration accommodation for New Zealand. Mr. Brodeur [4] complained of an insurance ring against Canada, and Mr. Buxton agreed to accept the resolution in the form, ' that concerted action be taken by all Governments of the Empire to promote better trade and postal communications between Great Britain and the overseas Dominions, and in particular to discourage shipping conferences or combines for the control of freight rates between the various portions of the Empire, in so far as the operation of such conferences are prejudicial to trade.' Mr. Buxton reminded the Conference that there was much doubt as to the effect of such conferences, and he had found no substantial support even for putting into effect the very moderate recommendations of the Royal Commission on Shipping Conferences.

[1] Cd. 5745, pp. 381–4.

[2] Ibid., pp. 372–81.

[3] Ibid., pp. 388–91.

[4] Ibid., pp. 384, 385. Mr. Pearce (pp. 386–8) also supported the motion, and instanced what had been done in Australia under the *Australian Industries Preservation Act* to break up the coastal combine.

(m) *Uniformity of Law*

As usual these resolutions were rather barren. Copyright was only mentioned, as the question had been fully discussed in 1910 at the subsidiary Conference of that date,[1] and nothing could be done pending action on the Imperial Bill then before the House of Commons. Alien immigration exclusion was referred to the Royal Commission on commercial relations.[2] But the Imperial Government secured the passing of a resolution (xii), 'That, where aliens are deported under the law of any Dominion from one part of the Empire to another, it is desirable that some system should be devised where the Governments concerned may effectively co-operate in the measures necessary for the final disposal of such aliens.' Hitherto both Canada and South Africa have freely deported aliens to England, thus adding to the difficulties of dealing there with criminous aliens, and the object of the Imperial Government was to secure that by timely notice it could put in force against such aliens the provisions of the *Aliens Act*.[3] The desirability of uniform laws as to companies, trade marks, and patents was agreed upon, but left over for action by the Secretariat and the other Government departments, with a view to securing that there should be greater uniformity, especially as regards forms of application for patents.[4] Dr. Findlay [5] went further, and pressed for inter-Imperial validity of patents. Accident compensation [6] evoked agreement except from General Botha,[7] who could not see its practicability. New Zealand and Great Britain already treat all persons alike, aliens or British subjects, whether the dependents be resident or not. In Australia and Canada the matter is one of state and provincial competence, and a general agreement was alone possible.

[1] See *Parl. Pap.*, Cd. 5272. [2] Cd. 5745, p. 425.

[3] Ibid., pp. 273, 274; Cd. 5746–1, pp. 263, 264. [4] Ibid., pp. 162–5.

[5] Ibid., p. 164. He quoted the varying decisions in England, New Zealand, and Australia on the cyanide case as an instance of the absurdities of the position. See Cd. 5746–1, pp. 140–54 (patents), 154–63 (trade marks), 164–203 (companies).

[6] Ibid., pp. 271–3. [7] Ibid., p. 272; Cd. 5746–1, pp. 259–62.

(n) Reciprocal legislation as to destitute and deserted persons

The emigration discussion on June 9 was followed by a discussion of the proposal of the New Zealand Government for reciprocal legislation for the relief of destitute and deserted persons.

The difficulty which the resolution was proposed to meet was, as explained by Dr. Findlay,[1] that arising from men deserting their wives and going to other Dominions. Proceedings under the *Fugitive Offenders Act*, 1881, when possible, were extremely expensive, and in addition defeated their object by depriving the offender of his means of livelihood. Reciprocity already existed in this matter between England, Ireland, and Scotland, and he desired there should be inter-Imperial reciprocity. New Zealand and the States in Australia were prepared to make reciprocal arrangements by law under which orders obtained in either New Zealand or Australia could be enforced by the Courts of the other. Mr. Fisher[2] supported this proposal, but Mr. Malan[3] saw practical difficulty in extending it beyond the limits of any Dominion, though he recognized that if one or two offenders were brought to book something would be done in order to obtain the desired result. He suggested, however, that the matter might be simplified by making desertion an offence for which deportation could take place. Mr. Burns,[4] while agreeing in the principle, thought there would be difficulty in applying it in practice. The English Local Government Board[5] thought that the cost of enforcing the principle would be disproportionate to the benefit, and this view was shared by the Irish Local Government Board and the Home Office, but he would be prepared to consider with the Law Officers of the Crown whether it might not be possible to meet the situation by making desertion an offence to be punished by deportation, and eventually, after a reply from Dr. Findlay, who preferred the practice of simply enforcing desertion orders in any part of the Empire, it was agreed to pass a resolution,

[1] Cd. 5745, pp. 206–8, 210, 211.
[2] Ibid., p. 208.
[3] Ibid., pp. 208–10.
[4] Ibid., p. 210.
[5] See *Parl. Pap.*, Cd. 5746–1, pp. 223–9.

'That in order to secure justice and protection for wives and children who have been deserted by their legal guardian, either in the United Kingdom or in any of the Dominions, reciprocal legal provisions should be adopted in the constituent parts of the Empire in the interest of such destitute and deserted persons.'

(*o*) *Recognition of Dominion and Imperial Judgements*

Mr. Buxton[1] on June 2 moved a resolution in favour of considering to what extent arrangements could be made between Great Britain and the Dominions with a view to the enforcement in one part of the Empire of commercial arbitration awards given in another part.

After explaining the principle of the resolution he suggested that it should be referred to a committee on which the Attorney-General would attend.

Dr. Findlay, on behalf of New Zealand, supported the resolution on the ground that it was not right that on these matters the Dominions and Great Britain should be on no closer footing than foreign countries, and the resolution was accordingly referred to a committee.

In committee[2] the matter unexpectedly developed. It was explained that an arbitration award became enforceable on an order of a judge, and from this result the view developed that all judicial awards might be rendered enforceable on order of a judge elsewhere in the Dominions. Ultimately, in the full Conference on June 16 a resolution (xxv) was adopted,[3] 'That the Imperial Government should consider in concert with the Dominion Governments whether and to what extent and under what conditions it is practicable and desirable to make mutual arrangements with a view to the enforcement in one part of the Empire of judgements and orders of the Courts of Justice in another part, including judgements or orders for the enforcement of commercial conciliation awards.' The Commonwealth and the Canadian representatives made it clear that they could only recom-

[1] *Parl. Pap.*, Cd. 5745, pp. 160–2; 5746–1, pp. 119–37.
[2] Cd. 5745, pp. 316–22.
[3] Ibid., pp. 425, 426.

mend this matter to the favourable consideration of the states and provinces, as their Parliaments had no power on this head.

(*p*) *International Exhibitions*

On June 2 Mr. Buxton[1] moved, and the Conference accepted his resolution, that the Imperial and Dominion Governments should consider in conjunction the question of the regulation of the conditions under which international exhibitions should receive support, with a view if possible to concerted action in the matter.

He explained that at present the exhibitions interfered with one another and prevented anything satisfactory being done.

(*q*) *Law of Conspiracy*

There was, on June 12, a brief discussion of the law of conspiracy, the Government of Australia having put down a resolution in favour of the submission of measures to Parliament for the prevention of acts of conspiracy to defeat or evade the law of any other part of the Empire. The resolution was not pressed by the Commonwealth Government, and eventually it was withdrawn on the understanding that the Imperial Government would communicate with the Crown Colonies and Protectorates to ascertain how far it would be possible for them to deal with the question raised by the Commonwealth Government by appropriate legislation.[2]

(*r*) *Suez Canal Dues*

The old grievance of these dues[3] was brought up by Mr. Fisher on behalf of Australia, and it was accepted at once as valid by Mr. McKinnon Wood for the Imperial Government, which did not wish to put its interests as a shareholder above those of the shipping world, but the Imperial Government had only one-tenth representation, and could not force its views. Mr. Fisher's resolution was accordingly recast to read (xxvi), 'That this Conference is of opinion that the dues levied upon shipping for using the

[1] Cd. 5745, pp. 170–2; 5746–1, pp. 205–8.

[2] Ibid., pp. 244–8.

[3] Ibid., pp. 426–9.

Suez Canal constitute a heavy charge, and tend to retard the trade within the Empire and with other countries, and invites the Government of the United Kingdom to continue to use their influence for the purpose of obtaining a substantial reduction of the present charges.'

(*s*) *Celebration of the King's Birthday*[1]

Agreement was readily arrived at to have an official celebration of the King's birthday on June 3, but an attempt to make the King's birthday Empire Day failed. New Zealand was ready to accept this, but Canada preferred to remain firm to May 24, and South Africa was unwilling to change that day; Australia admitted that it was really not a federal but a state question, and the matter dropped on Sir Wilfrid Laurier observing that the question was not worth a discussion.

(*t*) *Future Conferences*

On the last day of the Conference it was proposed by Mr. Fisher that, in the first place, there should be interchange of visits between the responsible ministers of the several Dominions, and that, in the second place, the Imperial Government should take into consideration the question of the possibility of holding a meeting of the Imperial Conference in one of the self-governing Dominions.[2] The first part of his resolution was welcomed on all sides, and the Imperial Government gladly accepted it as far as they were concerned. But it was pointed out that the second part would raise considerable difficulties. Sir Joseph Ward and General Botha both laid some stress on the fact that it was impossible in the Dominions to collect the full apparatus of information which was provided by the Government departments in the United Kingdom, and pointed out the advantages which accrued from the ministers of the Dominions meeting at once all the ministers of the Imperial Government, which would not be the case if the Conference

[1] Cd. 5745, pp. 274–8.

[2] Ibid., pp. 433 seq.

were held in any one of the Dominions. Accordingly it was agreed to adopt the resolution in the following form :—

That in the opinion of this Conference it is desirable that ministers of the United Kingdom and the Dominions should between the Conferences exchange reciprocal visits so as to make themselves personally acquainted with all the various parts of the Empire.

That the Government of the United Kingdom should take into consideration the possibility of holding a meeting of the Conference or a subsidiary Conference in one of the oversea Dominions.

§ 5. Naval and Military Defence

Naval and military defences were not discussed at the Conference itself, but were relegated for consideration at the Committee of Imperial Defence.

Advantage was taken of this arrangement in order to explain at full length to the ministers the situation of foreign affairs as a whole as it presented itself to His Majesty's Government, and thus effect was given in the most convenient possible manner to the desire which had been expressed in Parliament that the international situation should be fully explained to the delegates. It is clear that the discussion of that situation without special reference to defence would have been somewhat academic, while its close relation to defence secured both that it should be in full confidence and that it should be brought into contact with reality.

Following on this exposition of foreign relations, the question of military and naval defence was discussed, though no very definite results were arrived at, the whole plan being to confirm the arrangements which were made at the Military and Naval Conference of 1907. Statements were laid before the Imperial Defence Committee, showing how far the recommendations of that Conference had been carried into effect.[1] The General Staff had made considerable progress ; a paper as to present arrangements for loans, attachments, and interchanges of officers of the regular army

[1] See *Parl. Pap.*, Cd. 5746–2, pp. 3–14.

and officers of the oversea Dominions had been drawn up and forwarded to the Colonial Office for the consideration of the Governments concerned. Canada and New Zealand had accepted the proposals ; Australia had not yet replied, and the Government of the Union of South Africa were not yet in a position to make any engagements. Canada had set on foot a section of the Imperial General Staff ; Australia had done likewise, and so had New Zealand. The Chief of the General Staff at home had become Chief of the Imperial General Staff. In order to establish a close connexion, the necessity of personal intercourse between central and local sections had been felt, and with a view to meeting this requirement a system of semi-official correspondence on routine and training had been evolved. The duties of the local sections of the General Staff were local defences and the training of troops on lines similar to those followed in the United Kingdom by the Training Directory at the War Office.

Another memorandum dealt with the examinations for the promotion of officers of the permanent forces of the Dominions, and it showed how the Dominions had adopted similar examinations to those which take place in this country, and as a matter of fact the Army Council undertake the examination of officers of the permanent forces on most subjects, excluding only those which depend upon local conditions.

The Committee considered that the action taken had already resulted in marked improvement in military education.

There was also laid before the Committee information as to the courses of instruction in the United Kingdom and India for officers in the oversea Dominions, and a memorandum on the education of officers at the staff colleges.

A statement was made as to the terms upon which the services of the Inspector-General of the overseas forces could be secured for inspection purposes by the self-governing Dominions. Inspections were only to be made at the request of the Dominion Governments.

The resolutions with regard to naval matters are of more importance. They decide in effect the principles which are to regulate the organization of the naval forces of the United Kingdom and the two Dominions, Canada and Australia, which have adopted the principle of establishing local navies. In time of peace the naval services and forces of the Dominions will be exclusively under the control of their respective Governments, but training and discipline will be generally uniform; by arrangement there will be interchanges of officers and men between the forces of the Dominions and those under the control of the Admiralty. The ships of the Dominion Governments will be styled His Majesty's Canadian and His Majesty's Australian ships respectively, and they will hoist at the stern the White Ensign as a symbol of the authority of the Crown, and at the jack-staff the distinctive flag of the Dominion, and the fleets will bear the title 'Royal'. Special stations are assigned to the Australian and Canadian Governments.

The Canadian Atlantic Station is to include the waters north of 30° north latitude and west of the meridian of 40° west longitude.

The Canadian Pacific station is to include the waters north of 30° north latitude, and east of the meridian of 180° longitude.

The Australian naval station is to include :—

On the North. From 95° east longitude by the parallel 13° south latitude to 120° east longitude, thence north to 11° south latitude, thence to the boundary with Dutch New Guinea on the south coast in about longitude 141° east, thence along the coast of British New Guinea to the boundary with German New Guinea in latitude 8° south, thence east to 155° east longitude.

On the East. By the meridian of 155° east longitude to 15° south latitude, thence to 28° south latitude on the meridian of 170° east longitude, thence south to 32° south latitude, thence west to the meridian of 160° east longitude, thence south.

On the South. By the Antarctic Circle.

On the West. By the meridian of 95° east longitude.

In the event of the Canadian or Australian Governments sending their vessels to another part of the British Empire, notice is to be given to the British Admiralty, and if they desire to send ships to foreign ports the concurrence of the Imperial Government is to be obtained, in order that the necessary arrangements with the Foreign Office may be made, as is now done between the Admiralty and the Foreign Office in the case of ships of the British Fleet.

While the ships of the Dominions are at a foreign port, a report of their proceedings will be forwarded by the officer in command to the Commander-in-Chief on the station or to the British Admiralty. The officer in command of a Dominion ship so long as he remains in the foreign port will obey any instructions he may receive from the Government of the United Kingdom as to the conduct of any international matters that may arise, the Dominion Government being informed.

The commanding officer of a Dominion ship having to put into a foreign port without previous arrangement on account of stress of weather, damage, or any unforeseen emergency, will report his arrival and reason for calling to the Commander-in-Chief of the station or to the Admiralty, and will obey, so long as he remains in the foreign port, any instructions he may receive from the Government of the United Kingdom as to his relations with the authorities, the Dominion Government being informed.

When a ship of the British Admiralty meets a ship of the Dominions, the senior officer will have the right of command in matters of ceremony or international intercourse, or where united action is agreed upon, but will have no power to direct the movements of ships of the other service unless the ships are ordered to co-operate by mutual arrangement.

In foreign ports the senior officer will take command, but not so as to interfere with the orders that the junior may have received from his own Government.

In time of war, when a naval service or any part thereof has been put at the disposal of the Imperial Government by

the Dominion authorities, the ships will form an integral part of the British fleet, and will remain under the control of the Admiralty during the continuance of the war.

In time of peace arrangements will be made between the Admiralty and the Dominions for the ships of the Dominions to take part in fleet exercises or for any joint training considered necessary under the senior naval officer. While under the command of that officer he would not, however, interfere with the internal economy of ships of another service further than absolutely necessary.

When a court martial has to be ordered by a Dominion and a sufficient number of officers are not available in the Dominion service at the time, the British Admiralty, if requested, will make the necessary arrangements to enable a Court to be formed.[1] Provision will be made by Order of His Majesty in Council, and by the Dominion Governments respectively, to define the conditions under which officers of the different services are to sit on joint courts martial.

The British Admiralty undertakes to lend to the Dominions during the period of development of their services, under conditions to be agreed upon, such flag officer and other officers and men as may be needed. In their selection preference will be given to officers and men coming from or connected with the Dominions, but they should all be volunteers for the service.

The service of officers of the British fleet in the Dominion naval forces, or of officers of these forces in the British fleet, will count in all respects for promotion, pay, retirement, &c., as service in their respective forces.

In order to determine all questions of seniority that may arise, the names of all officers will be shown in the Navy List, and their seniority determined by the date of their commissions, whichever is the earlier, in the British, Canadian, or Australian services.

The Dominions having applied to their naval forces the

[1] Already done in the case of the court martial in respect of the Canadian vessel *Niobe*, in November 1911; cf. on it, *Montreal Daily Star*, Nov. 15, 1911.

King's regulations and Admiralty instructions and the *Naval Discipline Act*, the British Admiralty and Dominion Governments will communicate to each other any changes which they propose to make in those regulations or that Act.

It will be seen that the proposals virtually accept in the fullest way the independence of the Dominion navies save where international relations are concerned and save in war, when the Admiralty will assume full control of the navies if and when the appropriate authority, the Governor in Council, places either at the disposal of the Admiralty for the war. The only legislation necessary to effect this end would appear to be an amendment of the *Naval Discipline Act*, so as to apply it to the Dominion fleets when under the control of the Admiralty in time of war, and to remove any doubt as to the extra-territorial operation of the Dominion laws.[1]

It falls to be added that nothing was said at the Conference itself on General Botha's proposed resolution as to the charging to any subsidy granted to the navy of the cost of local defence works, the matter being left for discussion between the Admiralty and the South African[2] representatives.

§ 6. The Results of the Conference

Mr. Asquith and Sir Joseph Ward were fully justified in claiming that the Conference could challenge comparison with any of its predecessors as regards both the amount of what was done and the importance of the conclusions arrived at. Unquestionably the main importance of the Conference consists in the fact that for the first time the Imperial Government took special steps to impart to the Dominion Premiers a full statement of the position of international politics, especially in their bearing on the problems of defence. It is, of course, true that the importance of the episode may be exaggerated ; the admission of the Dominion ministers into the *arcana imperii* completes only the principle which has been acted upon consistently in recent years

[1] Cf. above, pp. 1278–81.

[2] *Parl. Pap.*, Cd. 5745, p. 432.

of explaining to the Dominion Governments the aspects of international politics which affect them directly, and it would be absurd to suggest that this is the first time on which a general statement on the course of foreign politics has been made to Dominion ministers; the Defence Conference of 1909 must have necessitated explanations. But it is true that this is the first occasion on which it has been considered desirable that an Imperial Conference should receive from the Imperial Government a full exposition of the general course of foreign politics as it presents itself to the Foreign Secretary. It is natural, therefore, to understand the emphasis laid both by Mr. Fisher[1] and General Botha on the fact that the Prime Ministers have been taken into confidence and given a share in the Government of the Empire.

On the other hand, it must be remembered that nothing has yet been done to make this share other than nominal, and Sir Wilfrid Laurier has on his part emphasized the fact that Canada gives no undertaking that she will automatically take an active part in wars entered into by the Government of the United Kingdom. He expressly declined to accept a resolution asking that political treaties in general should be submitted to the Dominions before they were ratified by the Imperial Government, giving as his reason that, if the Dominions demanded that they should be consulted in regard to such treaties, they would be bound to accept the consequences of the policies denoted by such treaties.

This is, of course, in perfect harmony with his repeated declaration in Canada. 'If England is at war,' he said in 1910,[2] 'we are at war and liable to attack. I do not say that we shall always be attacked, neither do I say that we would

[1] Cf. Governor-General's speech, September 5, 1911, *Debates*, pp. 5, 6; Mr. Deakin, ibid., p. 110; Mr. Fisher, pp. 129, 130 (for the earlier views of his government in 1909, see above, pp. 1284–6); Sir J. Findlay, New Zealand *Debates*, clv. 98.

[2] Canada *House of Commons Debates*, 1909–10, p. 2965; cf. also Ewart, *The Kingdom Papers*, pp. 50–2, 108–12; Thompson, Canada *House of Commons Debates*, 1908, pp. 3954–71; Sir W. Laurier, ibid., 3971–4; Mr. Fielding, ibid., 3978, 3979; *Round Table*, i. 435–42, 518–22.

take part in all the wars of England. That is a matter that must be determined by circumstances, upon which the Canadian Parliament will have to pronounce and will have to decide in its own best judgement.' So at the Imperial Conference [1] he maintained the view that if the Dominions claimed a right to be consulted, and they were consulted and their advice was followed, they would be bound to follow the fortunes of England by active participation in a war ensuing on the adoption of the course advised, and so in Canada before the Conference he stated that the question of the Declaration of London was one for a sovereign power, not for Canada, though it could be discussed in a quasi-official way.[2]

The attitude of Canada—no doubt the only possible attitude—of course prevents any real partnership in the foreign policy of the Empire for the present, and explains if it hardly justifies the somewhat sarcastic references in the opposition press in Australia [3] to the statements of Mr. Fisher as to the results of the Conference in this regard. Still, the acceptance of the principle of consultation in such a case as the Declaration of London is a real step in advance without any exact parallel.

Great importance attaches also to the decision with regard to the question of naturalization. It is not merely that the decision to permit a foreigner who has become naturalized in one of the Dominions under the local law to obtain, after five years' residence in the British Empire, a naturalization which would be of world-wide effect is a logical one, and does a good deal to lessen the absurdity by which a man may be Prime Minister of a Colony and yet an alien [4] when he attends the Coronation ceremony, but it

[1] *Parl. Pap.*, Cd. 5745, p. 117, where he reiterates his earlier view.

[2] The Liberal press in Canada almost unanimously supported the Prime Minister's attitude.

[3] e. g. Melbourne *Age*, June 2, 1911; Hobart *Mercury*, June 2. For a moderate view, cf. *British Australasian*, June 3; *Times*, July 13 (where also Mr. Fisher's views are given); *Parliamentary Debates*, 1911, p. 587.

[4] Ineligible for a Privy Councillorship or a Peerage; see 12 & 13 Will. III. c. 2, s. 3. A baronetcy or a knighthood can of course be bestowed even on an alien; see Forsyth, *Cases and Opinions on Consti-*

also serves a most important end as a partial solution of the problem of the assimilation of the vast number of Americans who are pouring into Canada, and who, as a rule, seek naturalization as soon as possible. Sir Wilfrid Laurier laid stress on the fact that these men at present could become Canadians but never British subjects in the full sense, and it is clear that this position is a decided menace to the continued maintenance of Canada as an intimate part of the Empire.

One other great constitutional reform consists in the agreement to establish an Imperial Court of Appeal which shall sit in two divisions, one of them to represent the House of Lords, and one to represent the Judicial Committee of the Privy Council. The existing House of Lords and the Judicial Committee alike will be strengthened for this purpose by the addition of two judges of the highest standing, thus increasing to six the number of Lords of Appeal whose services are permanently available for use in the highest courts. The normal quorum of judges in the Privy Council and in the House of Lords will be increased to five, and judgements of the Privy Council will in future be delivered in a new form. At present only one judgement is delivered, without indication whether it is unanimous or merely that of a majority, or of the grounds on which the minority, if any, has dissented from the finding of the Court; this form is convenient and proper, as it is intended to be given effect to by order of His Majesty in Council, and therefore there must be some judgement of the Court as a whole. The principle will be retained in future, but His Majesty's consent will be asked to a change by which it will be open for any judge who dissents from the decision of the Court to set forth the reasons for his dissent, although the judgement will still remain that of the whole committee.

In commercial matters, while there was much less discussion than in 1907, the actual record of performance was more substantial. The creation of a Royal Commission, including

tutional Law, p. 329. Annexation places, it seems, a subject of the annexed country in the same position as a natural-born subject (e. g. General Botha's Privy Councillorship in 1907).

representatives of the United Kingdom and the Dominions, to examine into the natural resources and trade conditions of all the self-governing parts of the Empire, promises to be of real service and the solution of many problems regarding inter-Imperial trade. If no practicable scheme for an All-Red Route has yet been devised, the interest of the Governments has already evoked an improvement in the services conducted by private enterprise, and the problem will no doubt ultimately be solved in this manner. The Postmaster-General was able to promise very substantial reductions both in deferred ordinary messages and in press telegrams, while the British Government somewhat unexpectedly presented for approval a scheme which will create a chain of wireless telegraph stations extending from England to Cyprus, Aden, Bombay, the Straits, and Western Australia. A minor postal reform was promised in the extension to Canada and Australia of the British Postal Order system.

The discussion on emigration, if not directly fruitful in results, was of great value in that it disposed of the claim which has been made in England that the Government should give more active assistance to emigration. All readers of the discussion must realize that the existing emigration represents to the full all the population that Great Britain can spare for the Dominions, and that, taken on the whole, the existing emigration agencies, public and private, so fully meet the needs of the situation that the expenditure of Imperial funds on emigration cannot be justified.

The other discussions were in the main negative in result. The attempt to obtain for the Dominions wider legislative powers in matters of shipping broke down almost at once in view of the discrepancy of opinion which was revealed on the part of the several Governments as to the powers which they actually possessed as matters stood, while the Imperial Government was not prepared to surrender to the Dominion Legislatures powers to regulate British ships on the high seas, which must result *de facto* in a preference to foreign vessels, or in retaliation on British shipping by foreign Powers. Questions of revenue prevented the Imperial

Government from offering any concession regarding the payment of double income-tax or of double death-duties, or the remission of stamp duties levied on Colonial bonds. The proposal of the Imperial Government that the Labour Exchanges should be used in connexion with emigration to the Dominions failed of acceptance owing to a hesitation as to the proposal by the Dominion ministers which proved impossible to remove. Resolutions were passed in favour of greater uniformity in the matter of trade-marks, copyright, and patents law, but such resolutions are now common form, and it is doubtful whether much can be accomplished to carry them into effect unless the Dominions are prepared in these matters to accept the Imperial standards, and this they have not all yet shown much readiness to do. Similar considerations apply to the resolution which was adopted in favour of the mutual enforcement throughout the Empire of judgements including commercial arbitration awards, especially as the matter is not one which can be dealt with either by the Parliament of the Dominion of Canada or the Parliament of the Commonwealth, but must be left to such action as may commend itself to the Parliaments of the States and Provinces not directly represented on the Conference. The discussion of the Declaration of London clearly showed the disadvantages under which the Dominion ministers suffer in dealing with such a subject. The Imperial Government were in this case inevitably superior in the understanding of the issues in question, and no argument was advanced by Dominion ministers which had not been already put forward, and with greater effect, by critics in the United Kingdom. Sir Edward Grey had therefore no difficulty in meeting the arguments adduced by the Dominion ministers and in obtaining the assent of all the Dominions (Australia abstaining) to the ratification of the Declaration, and Mr. Fisher, though unable consistently to vote for the ratification, said that he fully realized that, despite its defects, the Declaration was a great improvement on the existing state of affairs. The opponents of the Declaration did not feel that the situation was materially altered by the assent of the Premiers, since,

in their opinion, they had not been in a position to make any such study of the question as to justify reliance on their judgement.

The discussions on defence matters were, of course, confidential, but there was, as a matter of fact, nothing of any substantial importance to deal with so far as military defence was concerned, for the Conference of 1909 had settled in principle the lines on which Imperial co-operation in defence are to proceed, and therefore nothing more remained to be done on this occasion but to affirm the principles already accepted, and to report the progress already made in carrying out the resolutions of 1909. As regards naval defence much was done to render explicit the agreement arrived at in 1909.[1]

As regards commercial treaties a definite step was taken in the decision to attempt to secure the right of separate withdrawal from old treaties for the Dominions. But this is merely a carrying out of an old principle, nor does the Imperial Government seem to have conceded the right to any Dominion to conclude a treaty with a foreign country in which it would discriminate against the United Kingdom.[2]

[1] The change of government in Canada is expected to result in the reference to the people of the question of Canadian participation in naval defence; see Mr. Pelletier, *Canadian Gazette*, lviii. 188; Mr. Monk, *House of Commons*, Nov. 23, 1911. Both navies have adopted the new rule as to flags.

[2] See New Zealand *Parliamentary Debates*, clv. 93. Cf. also *Canadian Gazette*, lviii. 173, 177, 178; Ewart, *The Kingdom Papers*, pp. 107, 108. Negotiations for withdrawal had already been attempted with Austria and Italy at the wish of the Commonwealth, but unsuccessfully; see Cd. 5745, p. 337. The negotiations have been begun, and a new treaty made with Bolivia. For a list of the treaties, see p. 1153, to which as affecting all or some Dominions fall to be added that of 1826 with France, that of 1883 with Italy, that with Morocco of 1856, that of 1888 with Mexico, and possibly one or two others; cf. *House of Commons Debates*, xxx. 703, 841.

APPENDIX OF PREROGATIVE INSTRUMENTS

Canada

PAGE

I. Letters Patent 1561
II. Instructions 1564
III. Commission 1566

Commonwealth of Australia

I. Letters Patent 1569
II. Instructions 1572
III. Commission 1575
IV. Dormant Commission 1575

Union of South Africa

I. Letters Patent 1577
II. Instructions 1582
III. Commission 1585

New Zealand

I. Letters Patent 1585
II. Instructions 1590
III. Commission 1592
IV. Dormant Commission 1592

Australian States

I. Letters Patent 1594
II. Instructions 1599
III. Commission 1602
IV. Dormant Commission 1602
V. Commission to Lieutenant-Governor 1603

Newfoundland

I. Letters Patent 1604
II. Instructions 1608

APPENDIX OF PREROGATIVE INSTRUMENTS

CANADA

THE instruments issued under the prerogative for the Government of Canada comprise (1) Letters Patent under the Great Seal constituting the office of Governor-General, (2) Royal Instructions under the Sign Manual and Signet to the Governor-General, and (3) the Commission to the Governor-General. The two former instruments are permanent, the last is issued anew with each change of Governor, but is not otherwise varied in form. The permanent letters patent and instructions were first issued in 1878, and represent the result of Mr. Blake's criticisms ;[1] they were revised in 1905, and show traces of the influence of the similar instruments for the Commonwealth.[2]

I

LETTERS PATENT passed under the Great Seal of the United Kingdom, constituting the Office of Governor-General and Commander-in-Chief of the Dominion of Canada.

Letters Patent, Dated 15th June 1905.

Edward the Seventh, by the Grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India ; To all to whom these Presents shall come, Greeting :

Whereas by certain Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland bearing date at Westminster the Fifth day of October 1878, Her late Majesty Queen Victoria did constitute, order, and declare that there should be a Governor-General in and over Our Dominion of Canada, and that the person filling the said office of Governor-General should be from time to time appointed by Commission under the Royal Sign Manual and Signet :

[1] See above, pp. 158 seq.

[2] Clause V of the Instructions does not give the Governor-General power to pardon for an offence committed outside but triable in Canada. This power was given in the old Instructions, but, it seems, too close adherence to the Commonwealth model has resulted in its omission. See pp. 1415, 1416.

And whereas it is Our Will and pleasure to revoke the said Letters Patent, and to substitute other provisions in place thereof:

Now therefore We do by these presents revoke and determine the said recited Letters Patent, and everything therein contained, but without prejudice to anything lawfully done thereunder: And We do declare Our Will and pleasure as follows:

I. We do hereby constitute, order, and declare that there shall be a Governor-General and Commander-in-Chief [1] in and over Our Dominion of Canada (hereinafter called Our said Dominion), and appointments to the said office shall be made by Commission under Our Sign Manual and Signet.

And We do hereby authorize and command Our said Governor-General and Commander-in-Chief (hereinafter called Our said Governor-General) to do and execute, in due manner, all things that shall belong to his said office, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of *The British North America Act*, 1867, and of these present Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such Laws as are or shall hereafter be in force in Our said Dominion.

II. And We do hereby authorize and empower Our said Governor-General to keep and use the Great Seal of Our said Dominion for sealing all things whatsoever that shall pass the said Great Seal.

III. And We do further authorize and empower Our said Governor-General to constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of Our said Dominion, as may be lawfully constituted or appointed by Us.[2]

IV. And We do further authorize and empower Our said Governor-General, so far as We lawfully may, upon sufficient cause to him appearing, to remove from his office, or to suspend from the exercise of the same, any person exercising any office within Our said Dominion, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us in Our name or under Our authority.

V. And We do further authorize and empower Our said Governor-General to exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving the Parliament of Our said Dominion.[3]

[1] Title first given in these letters patent.

[2] This is to be understood as referring to federal officers (above, p. 700), and *de facto* the appointments are normally made under a statutory power. But this clause sanctions the use of the royal name, and so as to Clause IV.

[3] The powers of summons of Senators is given to the Governor by 30 Vict. c. 3, s. 24, of summoning and dissolving the House of Commons by ss. 38 and 50; even without the clause he would have enjoyed the right to prorogue *ex necessitate*. Clauses III–V really are covered by the last words of Clause I.

VI. And whereas by *The British North America Act*, 1867,[1] it is amongst other things enacted, that it shall be lawful for Us, if We think fit, to authorize the Governor-General of Our Dominion of Canada to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part or parts of Our said Dominion, and in that capacity to exercise, during the pleasure of Our said Governor-General, such of the powers, authorities, and functions of Our said Governor-General as he may deem it necessary or expedient to assign to such Deputy or Deputies, subject to any limitations or directions from time to time expressed or given by Us: Now we do hereby authorize and empower Our said Governor-General, subject to such limitations and directions as aforesaid, to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part or parts of Our said Dominion of Canada, and in that capacity to exercise, during his pleasure, such of his powers, functions, and authorities, as he may deem it necessary or expedient to assign to him or them: Provided always, that the appointment of such a Deputy or Deputies shall not affect the exercise of any such power, authority, or function by Our said Governor-General in person.

VII. And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence of Our said Governor-General out of Our said Dominion, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be vested in such person as may be appointed by Us under Our Sign Manual and Signet to be Our Lieutenant-Governor of Our said Dominion;[2] or if there shall be no such Lieutenant-Governor in Our said Dominion, then in such person or persons as may be appointed by Us under Our Sign Manual and Signet to administer the Government of the same; and in case there shall be no person or persons within Our said Dominion so appointed by Us, then in Our Chief Justice for the time being of the Supreme Court of Our said Dominion, or, in case of the death, incapacity, removal, or absence out of Our said Dominion of Our said Chief Justice for the time being, then in the Senior Judge for the time being of Our said Supreme Court then residing in Our said Dominion and not being under incapacity.

Provided always, that the said Senior Judge shall act in the administration of the Government only if and when Our said Chief Justice shall not be present within Our said Dominion and capable of administering the Government.

Provided further that no such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, until he or they shall have taken the Oaths appointed to be taken by the Governor-General of Our said Dominion, and in the manner provided by the Instructions accompanying these Our Letters Patent.

[1] s. 14. See e. g. *Canada Gazette*, xlv. 1459.

[2] It is not usual to appoint a Lieutenant-Governor for Canada, the Commonwealth, the Union, New Zealand, and Newfoundland.

VIII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of Our said Dominion, to be obedient, aiding, and assisting unto Our said Governor-General, or, in the event of his death, incapacity, or absence, to such person or persons as may, from time to time, under the provisions of these Our Letters Patent, administer the Government of Our said Dominion.

IX. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.

X. And We do further direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places as Our said Governor-General shall think fit within Our said Dominion of Canada.

In Witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the Fifteenth day of June, in the Fifth Year of Our Reign.

By Warrant under the King's Sign Manual.

MUIR MACKENZIE.

II

INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor-General and Commander-in-Chief of the Dominion of Canada.

Dated 15th June 1905.

EDWARD R. & I.

INSTRUCTIONS to Our Governor-General and Commander-in-Chief in and over Our Dominion of Canada, or, in his absence, to Our Lieutenant-Governor or other Officer for the time being administering the Government of Our said Dominion.

Given at Our Court at Saint James's, this Fifteenth day of June, 1905, in the Fifth year of Our Reign.

WHEREAS by certain Letters Patent bearing even date herewith We have constituted, ordered, and declared that there shall be a Governor-General and Commander-in-Chief (hereinafter called Our said Governor-General) in and over Our Dominion of Canada (hereinafter called Our said Dominion), And We have thereby authorized and commanded Our said Governor-General to do and execute in due manner all things that shall belong to his said office, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the said Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through One of Our Principal Secretaries of State, and to such Laws as are or shall hereafter be in force in Our said Dominion: Now, therefore, We do, by

these Our Instructions under Our Sign Manual and Signet, declare Our pleasure to be as follows :—

I. Our said Governor-General for the time being shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing Our said Governor-General for the time being, to be read and published in the presence of the Chief Justice for the time being, or other Judge of the Supreme Court of Our said Dominion, and of the members of the Privy Council in Our said Dominion.

Our said Governor-General, and every other Officer appointed to administer the Government of Our said Dominion, shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of the Reign of Her late Majesty Queen Victoria intituled 'An Act to Amend the Law relating to Promissory Oaths';[1] and likewise he or they shall take the usual Oath for the due execution of the Office of Our Governor-General and Commander-in-Chief in and over Our said Dominion, and for the due and impartial administration of justice; which Oaths the said Chief Justice for the time being of Our said Dominion, or, in his absence, or in the event of his being otherwise incapacitated, any Judge of the Supreme Court of Our said Dominion shall, and he is hereby required to tender and administer unto him or them.

II. And We do authorize and require Our said Governor-General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every persons or person, as he shall think fit, who shall hold any office or place of trust or profit in Our said Dominion, the said Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any Laws or Statutes in that behalf made and provided.

III. And We do require Our said Governor-General to communicate forthwith to the Privy Council for Our said Dominion these Our Instructions, and likewise all such others, from time to time, as he shall find convenient for Our service to be imparted to them.

IV. Our said Governor-General is to take care that all Laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such Laws; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of Our said Dominion, which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.[2]

V. And We do further authorize and empower Our said Governor-General, as he shall see occasion, in Our name and on Our behalf,

[1] 31 & 32 Vict. c. 72.

[2] It is rather curious that the Instructions to the Federations and the Union should contain a clause omitted in 1892 from the Australian Instructions to please Mr. Higinbotham; see above, p. 168; below, p. 1591, n. 1.

when any crime or offence against the Laws of Our said Dominion [1] has been committed for which the offender may be tried therein, to grant a pardon to any accomplice, in such crime or offence, who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, to grant to any offender convicted of any such crime or offence in any Court, or before any Judge, Justice, or Magistrate, within Our said Dominion, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our said Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. Provided always, that Our said Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from Our said Dominion. And we do hereby direct and enjoin that Our said Governor-General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of the Privy Council for Our said Dominion, and in other cases the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of Our said Dominion, Our said Governor-General shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

VI. And whereas great prejudice may happen to Our service and to the security of Our said Dominion by the absence of Our said Governor-General, he shall not, upon any pretence whatever, quit Our said Dominion without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State.

E. R. & I.

III

COMMISSION passed under the Royal Sign Manual and Signet, appointing Field Marshal His Royal Highness the Duke of Connaught and (of) Strathearn, K.G., K.T., K.P., G.C.B., G.C.S.I., G.C.M.G., G.C.I.E., G.C.V.O., to be Governor-General and Commander-in-Chief of the Dominion of Canada.

Dated March 6, 1911.

[1] i. e. not offences against provincial laws, as he was empowered to do up to 1905. See p. 1561, n. 2, for the omission of reference to crimes triable in the Dominion though committed outside, an omission which occurs also in Union Instructions, clause ix. In the Union the Governor-General would seem to have no power to pardon offences against provincial as opposed to Union laws, for 'laws of the Union' can hardly be pressed to mean 'laws in force in this Union'. Cf. p. 1574, n. 1.

GEORGE R.I.

George the Fifth, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To Our most dear and entirely beloved Uncle and most faithful Counsellor Arthur William Patrick Albert, Duke of Connaught and Strathearn, Knight of Our Most Noble Order of the Garter, &c., Greeting.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said Duke of Connaught and Strathearn to be, during Our pleasure, Our Governor-General and Commander-in-Chief in and over Our Dominion of Canada, with all the powers, rights, privileges, and advantages to the said Office belonging or appertaining.

II. And We do hereby authorize, empower, and command you to exercise and perform all and singular the powers and directions contained in certain Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Fifteenth day of June 1905, constituting the said Office of Governor-General and Commander-in-Chief, or in any other Letters Patent adding to, amending, or substituted for the same, according to such Orders and Instructions as Our Governor-General and Commander-in-Chief for the time being hath already received, or as you may hereafter receive from Us.

III. And further We do hereby appoint that, so soon as you shall have taken the prescribed oaths and have entered upon the duties of your Office, this Our present Commission shall supersede the Commission under the Sign Manual and Signet of His late Majesty, King Edward the Seventh, bearing date the Sixteenth day of June, 1905, appointing Our Right Trusty and Right Well-beloved Cousin Albert Henry George, Earl Grey, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George (now a Member of Our Most Honourable Privy Council and also Knight Grand Cross of Our Royal Victorian Order), to be Governor-General and Commander-in-Chief in and over Our Dominion of Canada.

IV. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Dominion, and all others whom it may concern, to take due notice hereof and to give their ready obedience accordingly.

Given at Our Court at Saint James's this Sixth day of March, 1911, in the First year of Our Reign.

By His Majesty's Command,

L. HARCOURT.

COMMONWEALTH OF AUSTRALIA

In the case of the Commonwealth there are four instruments, (1) Letters Patent constituting the office of Governor-General, (2) Instructions, (3) Commission, and (4) a Dormant Commission providing for the administration of the Government in the absence, &c., of the Governor-General. The last instrument is rendered necessary by the fact that the framers of the Commonwealth did not desire the Chief Justice to administer the government.

As the Constitution itself, in ss. 2 and 61, recognizes the office of Governor-General and confers upon him the executive government of the Commonwealth, and allows him, subject to the Constitution, to exercise such powers and functions of the Crown as may be conferred upon him, the creation of the office by letters patent has been criticized. But the practice criticized rests upon obvious grounds of convenience. The only alternative would have been to include in the commission issued to each Governor-General the rules laid down in clauses I, II, and VI–X of the letters patent, and it was clearly much more convenient to have permanent instruments accompanied by permanent instructions than a temporary commission accompanied by temporary or even by permanent instructions. It must be remembered, moreover, that the first rule contained in the letters patent as to the mode of appointing the Governor-General, by commission under the sign manual and signet, could hardly have been included in the Governor-General's commission, and would have had to be laid down, if it was to be laid down at all, in some other instrument.

Similarly as regards the Union. In the case of Canada the position is different, for the office of Governor-General is not expressly created by the *British North America Act*, and the formal creation is therefore still less open to objection than in the cases of the Commonwealth and the Union, where the office is expressly created by the Constitution. In all other cases the need of permanent letters patent is obvious : the office of Governor generally is not created at all by virtue of the Constitution Acts. It is assumed throughout the statute book that there is an officer so styled, and that he administers the government, but the creation is left to the prerogative. The Crown must both name from time to time the persons to exercise these powers, and must also assign the exact

nature of the powers, though of course within the limits of the statute law of the Colony and of the common-law powers of the Crown in that Colony. The instruments are therefore perfectly simple and useful. It is, however, the division of the documents which has led to the Chief Justice of South Australia thinking that under the power to appoint a deputy Governor given in the letters patent the deputy can only exercise powers resting on the prerogative, and not therefore powers given by statute law, except perhaps such powers as are merely reaffirmations of prerogative powers. For a deputy is merely one form of a Governor, and so long as the commission contained both the appointment of the Governor and his powers the right of the Crown to say that a man selected by the Governor should be Governor for certain purposes could hardly be denied.[1] But the division of instruments was neither intended to change nor has it really changed the position.

I

LETTERS PATENT passed under the Great Seal of the United Kingdom, constituting the Office of Governor-General and Commander-in-Chief of the Commonwealth of Australia.

Letters Patent, Dated 29th October 1900.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India: To all to whom these Presents shall come, Greeting.

WHEREAS, by an Act of Parliament passed on the Ninth day of July 1900, in the Sixty-fourth year of Our Reign, intituled 'An Act to constitute the Commonwealth of Australia',[2] it is enacted that 'it shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after proclamation, appoint a Governor-General for the Commonwealth:'

And whereas We did on the Seventeenth day of September One thousand nine hundred, by and with the advice of Our Privy Council,

[1] Unless it were held that there could only be one person at a time with gubernatorial functions, and for this I know no authority, while practice has uniformly been otherwise.

[2] 63 & 64 Vict. c. 12.

declare by Proclamation that, on and after the First day of January One thousand nine hundred and one, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also Western Australia, should be united in a Federal Commonwealth under the name of the Commonwealth of Australia: And whereas by the said recited Act certain powers, functions, and authorities were declared to be vested in the Governor-General: And whereas We are desirous of making effectual and permanent provision for the Office of Governor-General and Commander-in-Chief in and over Our said Commonwealth of Australia, without making new Letters Patent on each demise of the said Office: Now know ye that We have thought fit to constitute, order, and declare, and do by these presents constitute, order, and declare, that there shall be a Governor-General and Commander-in-Chief (hereinafter called the Governor-General) in and over Our Commonwealth of Australia (hereinafter called Our said Commonwealth), and that the person who shall fill the said Office of Governor-General shall be from time to time appointed by Commission under Our Sign Manual and Signet. And We do hereby authorize and command Our said Governor-General to do and execute, in due manner, all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of *The Commonwealth of Australia Constitution Act*, 1900, and of these present Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such laws as shall hereafter be in force in Our said Commonwealth.

II. There shall be a Great Seal of and for Our said Commonwealth, which Our said Governor-General shall keep and use for sealing all things whatsoever that shall pass the said Great Seal. Provided that until a Great Seal shall be provided, the Private Seal of Our said Governor-General may be used as the Great Seal of the Commonwealth of Australia.

III. The Governor-General may constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of Our said Commonwealth, as may be lawfully constituted or appointed by Us.[1]

IV. The Governor-General, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, may remove from his office, or suspend from the exercise of the same, any person exercising any office of Our said Commonwealth, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us in Our name or under Our authority.

V. The Governor-General may on Our behalf exercise all powers

[1] The powers given by Clauses III and IV are already conferred by ss. 64 and 67 of the Constitution.

under *The Commonwealth of Australia Constitution Act*, 1900, or otherwise in respect of the summoning, proroguing, or dissolving the Parliament of Our said Commonwealth.[1]

VI. And whereas by *The Commonwealth of Australia Constitution Act*, 1900,[2] it is amongst other things enacted, that We may authorize the Governor-General to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part of Our Commonwealth, and in that capacity to exercise, during the pleasure of the Governor-General, such powers and functions of the said Governor-General as he thinks fit to assign to such Deputy or Deputies, subject to any limitations expressed or directions given by Us: Now We do hereby authorize and empower Our said Governor-General, subject to such limitations and directions as aforesaid, to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part of Our said Commonwealth of Australia, and in that capacity to exercise, during his pleasure, such of his powers and functions, as he may deem it necessary or expedient to assign to him or them: Provided always, that the appointment of such a Deputy or Deputies shall not affect the exercise by the Governor-General himself of any power or function.

VII. And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence of Our said Governor-General out of Our said Commonwealth, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be vested in such person as may be appointed by Us under Our Sign Manual and Signet to be Our Lieutenant-Governor of Our said Commonwealth; or if there shall be no such Lieutenant-Governor in Our said Commonwealth, then in such person or persons as may be appointed by Us under Our Sign Manual and Signet to administer the Government of the same. *Provided always that the absence of the Governor-General from Our said Commonwealth for the purpose of visiting Our territory of Papua shall not be deemed absence out of Our said Commonwealth within the meaning of this clause of these Our Letters Patent.*[3] No such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, until he or they shall have taken the oaths appointed to be taken by the Governor-General of Our said Commonwealth, and in the manner provided by the Instructions accompanying these Our Letters Patent.

VIII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of Our said Commonwealth, to be obedient, aiding, and assisting unto Our said Governor-General, or, in the event of his death, incapacity,

[1] This power is given by s. 5.

[2] Const. s. 126.

[3] The words in italics were added by letters patent of March 29, 1911, which were passed to allow of the Governor-General visiting Papua, which is not part of the Commonwealth, without requiring that the holder of the Dormant Commission should be sworn in.

or absence, to such person or persons as may, from time to time, under the provisions of these Our Letters Patent, administer the Government of Our said Commonwealth.

IX. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.[1]

X. And We do further direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places as Our said Governor-General shall think fit within Our said Commonwealth of Australia.

In Witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the twenty-ninth day of October, in the Sixty-fourth Year of Our Reign.

By Warrant under the Queen's Sign Manual.

MUIR MACKENZIE.

II

INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor-General and Commander-in-Chief of the Commonwealth of Australia.

Dated October 29, 1900.

VICTORIA R. I.

INSTRUCTIONS to Our Governor-General and Commander-in-Chief in and over Our Commonwealth of Australia, or in his absence, to Our Lieutenant-Governor or the Officer for the time being administering the Government of Our said Commonwealth.

Given at Our Court at Saint James's this Twenty-ninth day of October 1900, in the Sixty-fourth year of Our Reign.

WHEREAS by certain Letters Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor-General and Commander-in-Chief (therein and hereinafter called the Governor-General), in and over Our Commonwealth of Australia (therein and hereinafter called Our said Commonwealth). And We have thereby authorized and commanded Our said Governor-General to do and execute in due manner all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the said Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such laws as shall hereafter be in force in Our said Common-

[1] Clauses III–V could be revoked without producing any result, as they are needless. But the powers contained in them could not be varied. Clause VII has been revoked and replaced by a new clause by letters patent of March 29, 1911.

wealth. Now, therefore, We do, by these Our Instructions under Our Sign Manual and Signet, declare Our pleasure to be as follows :—

I. Our first appointed Governor-General shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing Our said Governor-General, to be read and published in the presence of Our Governors, or in their absence of Our Lieutenant-Governors of Our Colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia and such of the members of the Executive Council, Judges, and members of the Legislatures of Our said Colonies as are able to attend.

II. Our said Governor-General of Our said Commonwealth shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled 'An Act to amend the Law relating to Promissory Oaths'; and likewise the usual oath for the due execution of the Office of Our Governor-General in and over Our said Commonwealth, and for the due and impartial administration of justice; which Oaths Our said Governor and Commander-in-Chief of Our Colony of New South Wales, or, in his absence, Our Lieutenant-Governor or other officer administering the Government of Our said Colony, shall and he is hereby required to tender and administer unto him.

III. Every Governor-General, and every other officer appointed to administer the Government of Our said Commonwealth after Our said first appointed Governor-General, shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing Our said Governor-General, to be read and published in the presence of the Chief Justice of the High Court of Australia, or some other Judge of the said Court, *or in the presence of the Chief Justice or some other Judge of the Supreme Court of any of the States of our said Commonwealth.*[1]

IV. Every Governor-General, and every other officer appointed to administer the Government of Our said Commonwealth after Our said first appointed Governor-General, shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled 'An Act to amend the Law relating to Promissory Oaths'; and likewise the usual Oath for the due execution of the Office of Our Governor-General in and over Our said Commonwealth, and for the due and impartial administration of justice; which Oaths the Chief Justice of the High Court of Australia, or some other Judge of the said Court, shall and he is hereby required to tender and administer unto him or them, *or the Chief Justice or some other Judge of the Supreme Court of any of our States of the Commonwealth, shall and he is hereby required to tender and administer unto him or them.*[1]

[1] The words in italics were added by additional instructions of August 11, 1902, with effect from July 14, 1902, in order to cover the swearing in of Lord

V. And We do authorize and require Our said Governor-General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every persons or person, as he shall think fit, who shall hold any office or place of trust or profit in Our said Commonwealth, the said Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any laws or statutes in that behalf made and provided.

VI. And We do require Our said Governor-General to communicate forthwith to the Members of the Executive Council for Our said Commonwealth these Our Instructions, and likewise all such others, from time to time, as he shall find convenient for Our service to be imparted to them.

VII. Our said Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of Our said Commonwealth, which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.

VIII. And We do further authorize and empower Our said Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of Our Commonwealth [1] has been committed for which the offender may be tried within Our said Commonwealth, to grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, to grant to any offender convicted of any such crime or offence in any Court, or before any Judge, Justice, or Magistrate, within Our said Commonwealth, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our said Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. Provided always, that Our said Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from Our said Commonwealth. And We do hereby direct and enjoin that Our said Governor-General

Tennyson as Administrator, on the departure of Lord Hopetoun, before a state judge.

[1] i.e. against Commonwealth statutes or any common law attaching to the Commonwealth, not in the case of state offences. A crime may be both state and Commonwealth, and according as it was treated as the one or the other (cf. *R.* v. *Macdonald*, 8 W. A. L. R. 149) the appropriate authority to pardon would be the Governor or Governor-General.

shall not pardon or reprieve any such offender without first receiving in capital cases the advice of the Executive Council for Our said Commonwealth, and in other cases the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of Our said Commonwealth, Our said Governor-General shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

IX. And whereas great prejudice may happen to Our service and to the security of Our said Commonwealth by the absence of Our said Governor-General, he shall not, upon any pretence whatever, quit Our said Commonwealth without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State.[1]

V. R. I.

III

COMMISSION passed under the Royal Sign Manual and Signet appointing The Right Honourable Lord Denman, P.C., K.C.V.O., to be Governor-General and Commander-in-Chief of the Commonwealth of Australia.

Dated March 22, 1911.

(The substantive parts are exactly as in the Canadian Commission.)

IV

DORMANT COMMISSION passed under the Royal Sign Manual and Signet, appointing The Right Honourable Lord Chelmsford, K.C.M.G., or Sir Gerald Strickland, K.C.M.G., to administer the Government of the Commonwealth of Australia in the event of the death, incapacity, removal, or absence of the Governor-General and Commander-in-Chief, and the Lieutenant-Governor (if any).

Dated December 2, 1909.

EDWARD R. & I.

Edward the Seventh, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To Our

[1] In view of the new letters patent of March 29, 1911, this clause was amended by instructions of even date to read—

'IX. Except for the purpose of visiting Our Territory of Papua, the Governor-General shall not' (&c.).

Right Trusty and Well-beloved Frederic John Napier, Baron Chelmsford, Knight Commander of Our Most Distinguished Order of Saint Michael and Saint George, Governor of Our State of New South Wales, or to Our Trusty and Well-beloved Sir Gerald Strickland, Count della Catena, Knight Commander of Our said Most Distinguished Order, Governor of Our State of Western Australia, Greeting.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said Frederic John Napier, Baron Chelmsford, during Our pleasure, to administer the Government of Our Commonwealth of Australia, with all the powers, rights, privileges, and advantages to the said Office belonging or appertaining, in the event of the death, incapacity, removal, or absence of Our Governor-General and Commander-in-Chief for the time being, and of Our Lieutenant-Governor (if any).

II. And in case of the death or incapacity of you the said Frederic John Napier, Baron Chelmsford, or of your absence from the Commonwealth, then We do appoint you the said Sir Gerald Strickland, during Our pleasure, to administer the Government of Our said Commonwealth of Australia in the events herein specified.

III. And We do hereby authorize, empower, and command you to exercise and perform all and singular the powers and authorities contained in certain Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-ninth day of October 1900, constituting the Office of Governor-General and Commander-in-Chief in and over Our Commonwealth of Australia, or in any other Letters Patent adding to, amending, or substituted for the same, and according to such Instructions as Our said Governor-General and Commander-in-Chief for the time being may have received, or may hereafter receive from Us, or through one of Our Principal Secretaries of State, and according to such Laws as are now or shall hereafter be in force in Our said Commonwealth.

IV. And We do hereby further direct and appoint that so soon as you the said Frederic John Napier, Baron Chelmsford, shall have taken the prescribed oaths and have entered upon the duties of your Office of administering the Government of Our Commonwealth of Australia under and by virtue of this Our present Commission, the Lieutenant-Governor of Our State of New South Wales, or any other person appointed by Commission under Our Sign Manual and Signet to administer the Government thereof, shall thereupon administer the Government of Our said State in like manner as if you were absent from Our said State.

V. And We do hereby further direct and appoint that if you the said Sir Gerald Strickland shall at any time in the events herein specified administer the Government of Our said Commonwealth of Australia, then We do hereby direct and appoint that so soon as you the said Sir Gerald Strickland shall have taken the prescribed oaths

and have entered upon the duties of your Office of administering the Government of Our said Commonwealth under and by virtue of this Our present Commission, the Commission under Our Sign Manual and Signet bearing date the Seventh day of May 1906 appointing Our Trusty and Well-beloved Sir Edward Albert Stone, Knight, to be Lieutenant-Governor of Our said State of Western Australia and its Dependencies shall thereupon take effect in like manner as if you were absent from Our said State.

VI. And We do hereby declare that this Our Commission shall supersede Our Commission under Our Sign Manual and Signet bearing date the Twenty-first day of April 1909, providing for the administration of the Government of Our said Commonwealth by you the said Frederic John Napier, Baron Chelmsford, or by you the said Sir Gerald Strickland, in the events therein specified.

VII. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Commonwealth, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at Our Court at Saint James's, this Second day of December 1909, in the Ninth year of Our Reign.

By His Majesty's Command,

CREWE.

UNION OF SOUTH AFRICA

The instruments in this case are exactly similar to those in the case of Canada.

I

LETTERS PATENT passed under the Great Seal of the United Kingdom, constituting the Office of Governor-General and Commander-in-Chief of the Union of South Africa.

Letters Patent, dated December 29, 1909.

Edward the Seventh, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India. To all to whom these presents shall come, Greeting.

WHEREAS by an Act of Parliament passed on the Twentieth day of September, 1909, in the ninth year of Our reign, intituled ' An Act to constitute the Union of South Africa ',[1] it was enacted that it should be lawful for Us, with the advice of Our Privy Council, to declare by proclamation that, on and after a day therein appointed,

[1] 9 Edw. VII. c. 9.

not being later than one year after the passing of that Act, Our Colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony (hereinafter called the Colonies), should be united in a legislative union under one Government under the name of the Union of South Africa, and that on and after the day appointed by such proclamation the Government and Parliament of the Union should have full power and authority within the limits of the Colonies, but that We might at any time after the proclamation appoint a Governor-General for the Union :

And whereas We did on the Second day of December 1909, by and with the advice of Our Privy Council, declare by Proclamation that on and after the Thirty-first day of May 1910, the Colonies should be united into a legislative union under one Government under the name of the Union of South Africa :

And whereas by the said recited Act it was further enacted that the Governor-General shall be appointed by Us, and shall have and may exercise in the Union during Our pleasure, but subject to that Act, such of Our powers and functions as We may be pleased to assign to him, and that the provisions of that Act relating to the Governor-General shall extend and apply to the Governor-General for the time being, or such person as We may appoint to administer the Government of the Union :

And whereas We are desirous of making effectual and permanent provision for the office of Governor-General and Commander-in-Chief in and over the Union :

Now know ye that We do by these presents declare Our Will and pleasure as follows :

I. There shall be a Governor-General and Commander-in-Chief in and over Our Union of South Africa (hereinafter called the Union), and appointments to the said office shall be made by Commission under Our Sign Manual and Signet.

And We do hereby authorize and command Our said Governor-General and Commander-in-Chief (hereinafter called the Governor-General) to do and execute, in due manner, all things that shall belong to his said office, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the *South Africa Act*, 1909, and of these present Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such laws as are or shall hereafter be in force in the Union.

II. There shall be a Great Seal of and for the Union, which the Governor-General shall keep and use for sealing all things whatsoever that shall pass the said Great Seal. Provided that, until a Great Seal shall be provided, the private seal of the Governor-General may be used as the Great Seal of the Union.

III. The Governor-General may on Our behalf exercise all powers under the *South Africa Act*, 1909, or otherwise in respect of the summoning, proroguing, or dissolving the Parliament of the Union.[1]

IV. And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence from the Union of the Governor-General, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be vested in such person as may be appointed by Us under Our Sign Manual and Signet to be Our Lieutenant-Governor of the Union ; or if there shall be no such Lieutenant-Governor in the Union, then in such person or persons as may be appointed by Us under Our Sign Manual and Signet to administer the Government of the same ; and in case there shall be no person or persons within the Union so appointed by Us, then in the Chief Justice of South Africa for the time being, or in case of the death, incapacity, removal, or absence from the Union of the said Chief Justice for the time being, then in the Senior Judge for the time being of the Supreme Court of South Africa then residing in the Union, and not being under incapacity. Provided always that the said Senior Judge shall act in the administration of the Government only if and when the said Chief Justice shall not be present within the Union and capable of administering the Government.

Provided further that no such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, until he or they shall have taken the Oaths appointed to be taken by the Governor-General of the Union, and in the manner provided by the Instructions accompanying these Our Letters Patent.

V. Whenever and so often as the Governor-General shall be temporarily absent from the Union in pursuance of any instructions from Us through one of Our Principal Secretaries of State, or in the execution of any Letters Patent or any Commission under Our Sign Manual and Signet appointing him to be Our High Commissioner or Special Commissioner for any territories in South Africa with which We may have relations, or appointing him to be Governor or to administer the Government of any Colony, province, or territory adjacent or near to the Union, or shall be absent from the Union for the purpose of visiting some neighbouring Colony, territory, or State, for a period not exceeding one month, then and in every such case the Governor-General may continue to exercise all and every the powers vested in him as fully as if he were residing within the Union.

VI. In the event of the Governor-General having occasion to be temporarily absent for a short period from the seat of Government or from the Union, he may, in every such case, by an instrument

[1] This power is given by ss. 20, 24, and 25 of the Act. No mention is made of the appointment and dismissal of officers, as is done in the case of Canada and the Commonwealth ; for it see ss. 14 and 15 of the Act.

under the Public Seal of the Union, constitute and appoint any person to be his Deputy within the Union during such temporary absence,[1] and in that capacity to exercise, perform, and execute for and on behalf of the Governor-General during such absence, but no longer, all such powers and authorities vested in the Governor-General, as shall in and by such instrument be specified and limited, but no others. Every such Deputy shall conform to and observe all such instructions as the Governor-General shall from time to time address to him for his guidance. Provided, nevertheless, that by the appointment of a Deputy, as aforesaid, the power and authority of the Governor-General shall not be abridged, altered, or in any way affected, otherwise than We may at any time hereafter think proper to direct.

Provided further that, if any such Deputy shall have been duly appointed, it shall not be necessary during the continuance in office of such Deputy for any person to assume the Government of the Union as Administrator thereof.

VII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of the Union, to be obedient, aiding, and assisting unto the Governor-General, or, in the event of his death, incapacity, or absence, to such person or persons as may, from time to time, under the provisions of these Our Letters Patent, administer the Government of the Union.

VIII. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.

IX. These Our Letters Patent shall be proclaimed at such place or places within the Union as the Governor-General shall think fit, and shall commence and come into operation on the day fixed by Our Proclamation for the establishment of the Union, whereupon the Letters Patent and Instructions described in the Schedule hereto, to the extent therein specified shall, without prejudice to anything lawfully done thereunder, be revoked.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster this Twenty-ninth day of December, in the Ninth Year of Our Reign.

By Warrant under the King's Sign Manual.

MUIR MACKENZIE.

[1] The Act, s. 11, only authorizes the appointment of a Deputy during the temporary absence of the Governor-General, presumably from the Union (not merely from the seat of Government), so that the provision in the latter case may rest on the prerogative.

SCHEDULE

Nature of Instrument.	Date.	Extent of Revocation.
Letters Patent constituting the office of Governor and Commander-in-Chief of the Colony of the Cape of Good Hope and its Dependencies	February 26, 1877	The whole
Letters Patent amending Letters Patent of the 26th February, 1877, constituting the office of Governor and Commander-in-Chief of the Colony of the Cape of Good Hope and its Dependencies	May 12, 1904 . .	The whole
Letters Patent further amending Letters Patent of the 26th February, 1877, constituting the office of Governor and Commander-in-Chief of the Colony of the Cape of Good Hope and its Dependencies	November 1, 1906	The whole
Royal Instructions to the Governor and Commander-in-Chief of the Cape of Good Hope and its Dependencies	February 26, 1877	The whole
Additional Royal Instructions to the Governor and Commander-in-Chief of the Colony of the Cape of Good Hope and its Dependencies	May 12, 1904 . .	The whole
Letters Patent constituting the office of Governor and Commander-in-Chief of the Colony of Natal	July 20, 1893 . .	The whole
Royal Instructions to the Governor and Commander-in-Chief of the Colony of Natal	July 20, 1893 . .	The whole
Letters Patent making further provision for the appointment of a Deputy Governor in the Colony of Natal in certain events	December 24,1903	The whole
Letters Patent in regard to the absence of the Governor of Natal from the Colony	August 18, 1905 .	The whole
Additional Royal Instructions to the Governor and Commander-in-Chief of the Colony of Natal making fresh provision as to the absence of the Governor from the Colony	August 18, 1905 .	The whole
Letters Patent constituting the office of Governor and Commander-in-Chief of the Colony of the Transvaal	December 6, 1906	All except Section II (as to boundaries)
Royal Instructions to the Governor and Commander-in-Chief of the Colony of the Transvaal	December 6, 1906	The whole
Letters Patent constituting the office of Governor and Commander-in-Chief of the Orange River Colony	June 5, 1907 . .	All except Section II (as to boundaries)
Royal Instructions to the Governor and Commander-in-Chief of the Orange River Colony	June 5, 1907 . .	The whole

II

INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor-General and Commander-in-Chief of the Union of South Africa.

Dated December 29, 1909.

EDWARD R. & I.

INSTRUCTIONS to Our Governor-General and Commander-in-Chief in and over Our Union of South Africa, or in his absence, to Our Lieutenant-Governor or the Officer for the time being administering the Government of the Union.

WHEREAS by certain Letters Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor-General and Commander-in-Chief (therein and hereinafter called the Governor-General), in and over Our Union of South Africa (therein and hereinafter called the Union) :

And whereas We have thereby authorized and commanded the Governor-General to do and execute in due manner all things that shall belong to his said office, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the said Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through One of Our Principal Secretaries of State, and to such laws as shall hereafter be in force in the Union :

Now, therefore, We do, by these Our Instructions under Our Sign Manual and Signet, declare Our pleasure to be as follows :—

I. Our first appointed Governor-General shall, with all due solemnity, cause Our Commission under Our Sign Manual and Signet appointing him to be read and published in the presence of the Senior Military Officer for the time being in command of Our Regular Forces in South Africa, and of such persons as are able to attend.

II. The said first appointed Governor-General shall take the Oath of Allegiance and the Oath of Office in the forms provided by an Act passed in the Session holden in the thirty-first and thirty-second years of the reign of Her late Majesty Queen Victoria, intituled ' An Act to amend the Law relating to Promissory Oaths ' ; which Oaths the senior Chief Justice or Judge of the Supreme Courts of the Cape of Good Hope, Natal, and the Transvaal, and the High Court of the Orange River Colony then present is hereby required to tender and administer unto him.

III. Every Governor-General of the Union after the said first appointed Governor-General, shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing him to be Governor-General, to be read and published in the presence of the

Chief Justice of South Africa, or some other Judge of the Supreme Court of South Africa.

IV. Every Governor-General, and every other officer appointed to administer the Government of the Union after the said first appointed Governor-General, shall take the oath of Allegiance and the Oath of Office in the forms provided by an Act passed in the Session holden in the thirty-first and thirty-second years of the Reign of Her late Majesty Queen Victoria, intituled 'An Act to amend the Law relating to Promissory Oaths'; which Oaths the Chief Justice of South Africa, or some other Judge of the Supreme Court of South Africa, shall and he is hereby required to tender and administer unto him or them.

V. And We do authorize and require the Governor-General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every person or persons, as he shall think fit, who shall hold any office or place of trust or profit in the Union, the said Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any laws or statutes in that behalf made and provided.

VI. And We do require the Governor-General to communicate forthwith to the Members of the Executive Council for the Union these Our Instructions, and likewise all such others, from time to time, as he shall find convenient for Our service to be imparted to them.

VII. The Governor-General shall not assent in Our name to any bill which We have specially instructed him through one of Our Principal Secretaries of State to reserve; and he shall take special care that he does not assent to any bill which he may be required under the *South Africa Act*, 1909, to reserve; and in particular he shall reserve any bill which disqualifies any person in the Province of the Cape of Good Hope, who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is, or may become, capable of being registered as a voter, from being so registered in the Province of the Cape of Good Hope by reason of his race or colour only.

VIII. The Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of the Union, which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.

IX. And We do further authorize and empower the Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of the Union has been

committed for which the offender may be tried within the Union, to grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, to grant to any offender convicted of any such crime or offence in any Court, or before any Judge, Justice, or Magistrate, within the Union, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence, for such period as to the Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. Provided always, that if the offender be a natural-born British subject or a British subject by naturalization in any part of Our Dominions, the Governor-General shall in no case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from the Union.

And We do hereby direct and enjoin that the Governor-General shall not pardon, grant remission to, or reprieve any such offender without first receiving in cases other than capital cases the advice of one, at least, of his Ministers.

Whenever any offender shall have been condemned to suffer death by the sentence of any Court, the Governor-General shall consult the Executive Council upon the case of such offender, submitting to the Council any report that may have been made by the Judge who tried the case, and, whenever it appears advisable to do so, taking measures to invite the attendance of such Judge at the Council. The Governor-General shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do, upon receiving the advice of the Executive Council thereon; but in all such cases he is to decide either to extend or to withhold a pardon or reprieve, according to his own deliberate judgement, whether the Members of the Executive Council concur therein or otherwise; entering, nevertheless, on the Minutes of the Executive Council, a Minute of his reasons at length in case he should decide any such question in opposition to the judgement of the majority of the Members thereof.

X. Except in accordance with the provisions of any Letters Patent or of any Commission under Our Sign Manual and Signet, the Governor-General shall not, upon any pretence whatever, quit the Union without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, unless for the purpose of visiting some neighbouring Colony, Territory, or State, for periods not exceeding one month at any one time, nor exceeding in the aggregate one month for every year's service in the Union.

The temporary absence of the Governor-General for any period not exceeding one month shall not, if he have previously informed the Executive Council, in writing, of his intended absence, and if he

have duly appointed a Deputy in accordance with the above recited Letters Patent, nor shall any extension of such period sanctioned by one of Our Principal Secretaries of State and not exceeding fourteen days, be deemed absence from the Union within the meaning of the said Letters Patent.

Given at Our Court at Saint James's, this Twenty-ninth day of December, 1909, in the Ninth Year of Our Reign.

III

COMMISSION under the Royal Sign Manual and Signet, appointing the Right Honourable Viscount Gladstone to be Governor-General and Commander-in-Chief of the Union of South Africa.

(This is identical in substance with Clauses I, II, and IV of the Canadian Commission, with the necessary omission in Clause II of any reference to instructions already given to former Governors-General.)

NEW ZEALAND

In the Dominion there are in addition to the Letters Patent and Instructions the Commission and a Dormant Commission.

I

LETTERS PATENT passed under the Great Seal of the United Kingdom, constituting the Office of Governor and Commander-in-Chief of the Dominion of New Zealand.

Letters Patent dated November 18, 1907.

Edward the Seventh, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To all to whom these Presents shall come, Greeting.

WHEREAS, by certain Letters Patent, under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster, the Twenty-first day of February, 1879, Her late Majesty Queen Victoria did constitute, order, and declare that there should be a Governor and Commander-in-Chief in and over the Colony of New Zealand and its Dependencies (therein called the Colony) and that appointments to the said Office when vacant should be made by Commission under the Royal Sign Manual and Signet:

And whereas by an Act passed in the Session holden in the Twenty-sixth and Twenty-seventh years of the Reign of Her late Majesty Queen Victoria, entitled 'An Act to alter the Boundaries of New

Zealand ',[1] the Colony of New Zealand was defined as comprising all Territories, Islands, and Countries lying between the one hundred and sixty-second degree of East Longitude and the one hundred and seventy-third degree of West Longitude and between the thirty-third and fifty-third parallels of South Latitude :

And whereas by a Proclamation bearing date the twenty-first day of July 1887, issued by the Governor of New Zealand under authority of Letters Patent passed under the Great Seal of Our United Kingdom, bearing date the eighteenth day of January 1887, the Islands situate in the South Pacific Ocean between the parallels of 29 degrees and 32 degrees South Latitude and the meridians of 177 degrees and 180 degrees West Longitude, known as the Kermadec Group, were, from and after the first day of August 1887, annexed to and became part of the Colony of New Zealand :

And whereas by a Proclamation bearing date the tenth day of June 1901, issued by the Governor of New Zealand by authority of an Order by Us in Our Privy Council dated the thirteenth day of May 1901, made by virtue and in exercise of the powers vested in Us by the *Colonial Boundaries Act* 1895, the Boundaries of the Colony of New Zealand were on and after the eleventh day of June 1901 extended so as to include the islands of the Cook Group, and all other the Islands and Territories which were then or might thereafter form part of Our Dominions situate within the following boundary line, viz. :—A line commencing at a point at the intersection of the 23rd degree of South Latitude and the 156th degree of Longitude West of Greenwich, and proceeding due North to the point of intersection of the 8th degree of South Latitude and the 156th degree of Longitude West of Greenwich, thence due West to the point of intersection of the 8th degree of South Latitude and the 167th degree of Longitude West of Greenwich, thence due South to the point of intersection of the 17th degree of South Latitude and the 167th degree of Longitude West of Greenwich, thence due West to the point of intersection of the 17th degree of South Latitude and the 170th degree of Longitude West of Greenwich, thence due South to the point of intersection of the 23rd degree of South Latitude and the 170th degree of Longitude West of Greenwich, and thence due East to the point of intersection of the 23rd degree of South Latitude and the 156th degree of Longitude West of Greenwich :

And whereas by Our Royal Proclamation, bearing date the ninth day of September 1907, We did ordain, declare, and command that on and after the Twenty-sixth day of September 1907 the Colony of New Zealand and the territory belonging thereto should be called and known by the title of the Dominion of New Zealand :

And whereas it has become necessary to make provision for the office of Governor and Commander-in-Chief in and over Our Dominion of New Zealand :

I. Now therefore We do by these presents revoke and determine

[1] 26 & 27 Vict. c. 23.

the above-recited Letters Patent of the Twenty-first day of February 1879, but without prejudice to anything lawfully done thereunder. And We do by these presents constitute, order, and declare that there shall be a Governor and Commander-in-Chief in and over Our Dominion of New Zealand (hereinafter called the Dominion), comprising the Territories, Islands, and Countries forming the Colony of New Zealand as defined in the above-recited Act, passed in the Session holden in the Twenty-sixth and Twenty-seventh Years of the Reign of Her late Majesty Queen Victoria, entitled 'An Act to alter the Boundaries of New Zealand', together with the further Islands and Territories included within the Boundaries of the Colony of New Zealand by the above-recited Proclamations of the Governor thereof, dated respectively the Twenty-first day of July 1887 and the Tenth day of June 1901; and that appointments to the said office when vacant shall be made by Commission under Our Sign Manual and Signet.

II. We do hereby authorize, empower, and command Our said Governor and Commander-in-Chief (hereinafter called the Governor) to do and execute all things that belong to his said Office, according to the tenor of these Our Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us, through one of Our Principal Secretaries of State, and to such Laws as are now or shall hereafter be in force in the Dominion.

III. Every person appointed to fill the Office of Governor shall, with all due solemnity, before entering on any of the duties of his Office, cause the Commission appointing him to be Governor to be read and published at the seat of Government, in the presence of the Chief Justice, or some other Judge of the Supreme Court of the Dominion, and of the Members of the Executive Council thereof, which being done, he shall then and there take before them the Oath of Allegiance, in the form provided by an Act passed in the Session holden in the Thirty-first and Thirty-second years of the Reign of Her late Majesty Queen Victoria, intituled 'An Act to amend the Law relating to Promissory Oaths'; and likewise the usual Oath for the due execution of the Office of Governor, and for the due and impartial administration of justice; which Oaths the said Chief Justice or Judge is hereby required to administer.

IV. The Governor shall keep and use the Public Seal of the Dominion for sealing all things whatsoever that shall pass the said Public Seal, and until a new Public Seal shall be provided for the Dominion,[1] the Public Seal used as the Public Seal of the Territories, Islands, and Countries prior to the Twenty-sixth day of September 1907 known as the Colony of New Zealand shall be deemed to be the Public Seal of the Dominion.

[1] This was done on the accession of King George V

V. There shall be an Executive Council for the Dominion, and the said Council shall consist of such persons as were immediately before the coming into force of these Our Letters Patent Members of the Executive Council of New Zealand, or as may at any time be Members of the Executive Council of the Dominion in accordance with any Law enacted by the Legislature of the Dominion,[1] and of such other persons as the Governor shall, from time to time, in Our name and on Our behalf, but subject to any Law as aforesaid, appoint under the Public Seal of the Dominion to be Members of the Executive Council of the Dominion.

VI. The Governor, in Our name and on Our behalf, may make and execute, under the said Public Seal, grants and dispositions of any lands which may be lawfully granted and disposed of by Us within the Dominion.[2]

VII. The Governor may constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of the Dominion as may be lawfully constituted or appointed by Us.[3]

VIII. When any crime has been committed within the Dominion, or for which the offender may be tried therein, the Governor may as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, may grant to any offender convicted in any Court, or before any Judge, or other Magistrate, within the Dominion, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such period as the Governor thinks fit; and further may remit any fines, penalties, or forfeitures due or accrued to Us. Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself or be removed from the Dominion.

IX. The Governor may, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, remove from his office, or suspend from the exercise of the same, any person exercising any office or place within the Dominion under or by virtue of any Commission or Warrant granted, or which may be granted, by Us, in Our name, or under Our authority.[3]

X. The Governor may exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving any Legislative

[1] No such law has been passed.

[2] This power is obsolete, provision being made by statute; cf. on the power which was given in 1840, *Reg.* v. *Clarke*, 7 Moo. P. C. 77; *Reg.* v. *Hughes*, 1 P. C. 81.

[3] This power is exercised now under statute. For an unsuccessful attempt to appoint a judge under it without parliamentary sanction, see *Buckley* v. *Edwards*, [1892] A. C. 387.

Body, which now is or hereafter may be established within the Dominion, and in respect of the appointment of Members thereto.[1]

XI. In the event of the death, incapacity, or removal of the Governor, or of his departure from the Dominion, Our Lieutenant-Governor, or, if there be no such Officer in the Dominion, then such person or persons as We may appoint under Our Sign Manual and Signet, shall, during Our pleasure, administer the Government of the Dominion, first taking the Oaths herein-before directed to be taken by the Governor, and in the manner herein prescribed ; which being done, We do hereby authorize, empower, and command Our Lieu tenant-Governor, and every other such Administrator as aforesaid, to do and execute during Our pleasure all things that belong to the Office of Governor and Commander-in-Chief according to the tenor of these Our Letters Patent, and according to Our Instructions as aforesaid, and the Laws of the Dominion.

XII. In the event of the Governor having occasion to be temporarily absent for a short period from the seat of Government or from the Dominion, he may in every such case, by an Instrument under the Public Seal of the Dominion, constitute and appoint Our Lieutenant-Governor, or if there be no such Officer, then any other person to be his Deputy during such temporary absence, and in that capacity to exercise, perform, and execute for and on behalf of the Governor during such absence, but no longer, all such powers and authorities vested in the Governor by these Our Letters Patent, as shall in and by such Instrument be specified and limited, but no others. Provided, nevertheless, that, by the appointment of a Deputy as aforesaid, the power and authority of the Governor shall not be abridged, altered, or in any way affected, otherwise than We may at any time hereafter think proper to direct.[2]

XIII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of the Dominion, to be obedient, aiding, and assisting unto the Governor or such person or persons as may from time to time, under the provisions of these Our Letters Patent, administer the Government of the Dominion.

XIV. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.

XV. And We do direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places within Our Dominion as the Governor shall think fit.

In Witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the Eighteenth day of November, in the Seventh year of Our Reign.

By Warrant under the King's Sign Manual.

MUIR MACKENZIE.

[1] This power is statutory, being given by 15 & 16 Vict. c. 72, s. 44, and the New Zealand *Legislature Act*, ss. 2, 13.

[2] This power first appears in the Governor's commission in 1861 (clause ix).

II

INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the Dominion of New Zealand.

Dated November 18, 1907.

EDWARD R. & I.

INSTRUCTIONS to Our Governor and Commander-in-Chief in and over Our Dominion of New Zealand, or in his absence to Our Lieutenant-Governor or other Officer for the time being administering the Government of Our said Dominion.[1]

WHEREAS by certain Letters Patent bearing even date herewith We have constituted, ordered, and declared that there shall be a Governor and Commander-in-Chief (therein and hereinafter called the Governor) in and over Our Dominion of New Zealand (therein and hereinafter called the Dominion):

And whereas We have thereby authorized and commanded the Governor to do and execute all things that belong to his said office, according to the tenor of Our said Letters Patent, and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet or by Our Order in Our Privy Council or by Us through one of Our Principal Secretaries of State, and to such Laws as are now or shall hereafter be in force in the Dominion:

Now know you that We do by these Our Instructions under Our Sign Manual and Signet direct and enjoin and declare Our will and pleasure as follows:—

I. In these Our Instructions, unless inconsistent with the context, the term 'the Governor' shall include every person for the time being administering the Government of the Dominion, and the term 'the Executive Council' shall mean the members of the Executive Council for the Dominion who are for the time being the responsible advisers of the Governor.[2]

II. The Governor may, whenever he thinks fit, require any person in the public service to take the Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any Law in force in the Dominion. The Governor is to administer such oaths or cause them to be administered by some Public Officer of the Dominion.

[1] Permanent instructions were issued on February 21, 1879. They were revised simultaneously with the Australian instructions on March 26, 1892 (see *Constitution and Government of New Zealand*, pp. 182–6).

[2] There are no other members of an Executive Council in New Zealand, and the phrase seems to have been borrowed in 1892 from a Colony where the Executive Council, as in Victoria and Tasmania, contains past members.

III. The Governor shall forthwith communicate these Our Instructions to the Executive Council, and likewise all such others, from time to time, as he shall find convenient for Our service to impart to them.

IV. The Executive Council shall not proceed to the dispatch of business unless two members at the least (exclusive of the Governor or of the member presiding) be present and assisting throughout the whole of the meetings at which any such business shall be dispatched.

V. In the execution of the powers and authorities vested in him, the Governor shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council, he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the matter to Us without delay, with the reasons for his so acting.

In any such case it shall be competent to any Member of the said Council to require that there be recorded upon the Minutes of the Council the grounds of any advice or opinion that he may give upon the question.

VI. The Governor is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws ; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of the Dominion which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.[1]

VII. The Governor shall not pardon or reprieve any offender without first receiving in capital cases the advice of the Executive Council, and in other cases the advice of one, at least, of his Ministers ; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of the Dominion, the Governor shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

VIII. All Commissions granted by the Governor to any persons to be Judges, Justices of the Peace, or other officers, shall, unless otherwise provided by law, be granted during pleasure only.

IX. The Governor shall not quit the Dominion without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, except for the purpose of visiting the Governor-General of Australia, or the

[1] This clause was restored in 1907 ; it was omitted in 1892 in deference to Mr. Higinbotham (*Constitution and Government of New Zealand*, pp. 187, 188), but when all mention of reservation of Bills disappeared in 1907, when New Zealand acquired rank as a Dominion, it was reintroduced from the Canadian and Commonwealth models ; above, p. 1565, n. 2.

Governor of any neighbouring Colony or State for periods not exceeding one month at any one time, nor exceeding in the aggregate one month for every year's service in the Dominion.

X. The temporary absence of the Governor for any period not exceeding one month shall not, if he have previously informed the Executive Council, in writing, of his intended absence, and if he have duly appointed a Deputy in accordance with Our said Letters Patent, nor shall any extension of such period sanctioned by one of Our Principal Secretaries of State and not exceeding fourteen days, be deemed a departure from the Dominion within the meaning of Our said Letters Patent.

XI. From and after the date of the coming into operation of Our above-recited Letters Patent of even date, the Instructions issued to the Governor of the Colony of New Zealand under the Sign Manual and Signet of Her late Majesty Queen Victoria, bearing date the Twenty-sixth day of March 1892 shall, without prejudice to anything lawfully done thereunder, be revoked.

Given at Our Court at Saint James's this Eighteenth day of November 1907, in the Seventh year of Our Reign.

III

COMMISSION under the Royal Sign Manual and Signet, appointing The Right Honourable Lord Islington, D.S.O., to be Governor and Commander-in-Chief of the Dominion of New Zealand.

(This Commission is substantially identical with the Canadian Commission.)

IV

DORMANT COMMISSION passed under the Royal Sign Manual and Signet, appointing the Chief Justice or the Senior Judge for the time being of the Supreme Court of New Zealand to administer the Government of that Dominion, in the event of the death, incapacity, or absence of the Governor and Lieutenant-Governor (if any).

Dated December 18, 1907.

EDWARD R. & I.

Edward the Seventh, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India: To our Trusty and Well-beloved the Chief Justice or the Senior Judge for the time being of the Supreme Court of New Zealand: Greeting.

WHEREAS by Our Letters Patent under the Great Seal of Our Untied Kingdom of Great Britain and Ireland, bearing date at West-

minster, the Eighteenth day of November 1907, We did constitute, order, and declare that there should be a Governor and Commander-in-Chief in and over Our Dominion of New Zealand, and did authorize, empower, and command Our said Governor and Commander-in-Chief to do and execute all things belonging to his said office as therein is more particularly set forth :

And whereas by Our said Letters Patent We did declare that, in the event of the death, incapacity, or removal of Our said Governor and Commander-in-Chief or of his departure from the Dominion, Our Lieutenant-Governor, or if there should be no such Officer in the Dominion, then such person or persons as We might appoint under Our Sign Manual and Signet, should during our pleasure administer the Government of the same :

Now know you that by this Our Commission, under Our Sign Manual and Signet, We do appoint you the Chief Justice for the time being of Our said Dominion of New Zealand, until Our further pleasure shall be signified, to administer the Government thereof in case of the death, incapacity, or removal, or of the departure from the Dominion of Our said Governor and Commander-in-Chief, as well as of Our Lieutenant-Governor (if any), with all and singular the powers and authorities granted by Our said Letters Patent, or by any other Letters Patent adding to, amending, or substituted for the same ; and, in the said event, and in case of the death, incapacity or departure from Our said Dominion of the said Chief Justice for the time being, then We do appoint you, the Senior Judge for the time being of the Supreme Court of Our said Dominion, then residing therein, and not being under incapacity, to administer the Government thereof, with all the powers and authorities aforesaid. And We do hereby authorize and require you the said Chief Justice or the said Senior Judge for the time being, as the case may be, to exercise and perform the said powers and authorities according to such Instructions as Our said Governor and Commander-in-Chief or Our said Lieutenant-Governor hath already received or may hereafter receive from Us, under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, and according to such laws as are now or shall hereafter be in force in Our said Dominion.

Provided always that you, the Senior Judge, shall act in the administration of the Government only when and so often as you, the said Chief Justice, shall not be present within the Dominion and capable of administering the Government.[1]

And We do hereby appoint that from and after the date of the coming into operation of Our above recited Letters Patent of the Eighteenth day of November 1907, this Our present Commission shall supersede the Commission under the Sign Manual and Signet of Her late Majesty Queen Victoria dated the Twenty-second day of

[1] This clause meets a difficulty which was raised in Victoria in 1875 as to the right of the Chief Justice to resume the administration from the Senior Judge after once the latter had commenced to act ; see *Standard*, March 17, 1875.

February 1879, appointing the Chief Justice or the Senior Judge for the time being of the Colony of New Zealand, to be administrator thereof, in the events therein specified.

And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Dominion, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at Our Court at Saint James's this eighteenth day of December 1907, in the Seventh year of Our Reign.

By His Majesty's Command.

ELGIN.

THE AUSTRALIAN STATES

The Australian States all possess permanent letters patent and instructions issued on October 29, 1900, in view of federation. These instruments are alterations of the instruments existing at that date to meet the new circumstances arising out of the *Commonwealth of Australia Constitution Act*. There are also in each case a Commission to the Governor and a Dormant Commission to the Chief Justice or Senior Judge. Besides these there are Commissions appointing Lieutenant-Governors, issued to the Chief Justices as a mark of distinction in New South Wales, Victoria, South Australia, and Tasmania, to the President of the Legislative Council in Queensland, and to an ex-Chief Justice in Western Australia. Under these commissions the holders assume the office of Governor in the absence, &c., of the Governor. If there is no Lieutenant-Governor, the dormant commission comes into operation.

I

LETTERS PATENT passed under the Great Seal of the United Kingdom, constituting the Office of Governor of the State of New South Wales and its Dependencies, in the Commonwealth of Australia.

Letters Patent, Dated October 29, 1900.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India: To all to whom these Presents shall come, Greeting.

WHEREAS[1] by certain Letters Patent, under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at

[1] In each case the preamble cites the former letters patent and the operative clause revokes them and defines the boundaries and constitutes the office. In the case of Western Australia the first clause is split into two.

Westminster the Twenty-ninth day of April 1879, We did constitute the Office of Governor and Commander-in-Chief in and over Our Colony of New South Wales as therein described, and its Dependencies: And whereas in virtue of the provisions of the *Commonwealth of Australia Constitution Act*, 1900, and of Our Proclamation issued thereunder, by and with the advice of Our Privy Council, on the Seventeenth day of September One thousand nine hundred, We have by certain Letters Patent under the said Great Seal of Our United Kingdom of Great Britain and Ireland, bearing even date herewith, made provision for the Office of Governor-General and Commander-in-Chief in and over Our Commonwealth of Australia: And whereas it has become necessary to make permanent provision for the Office of Governor in and over Our State of New South Wales and its Dependencies in the Commonwealth of Australia without making new Letters Patent on each demise of the said Office. Now know ye that We do by these presents revoke and determine the said first recited Letters Patent, bearing date the Twenty-ninth day of April 1879, and everything therein contained, from and after the proclamation of these Our Letters Patent as hereinafter provided: And further know ye that We do by these presents constitute, order, and declare that there shall be a Governor in and over Our State of New South Wales and its Dependencies in the Commonwealth of Australia (which said State of New South Wales and its Dependencies are herein after called the State), comprising all that portion of Our territory of Australia or New Holland lying between the one hundred and twenty-ninth and one hundred and fifty-fourth degrees of east longitude, and northwards of the fortieth degree of south latitude, including all the islands adjacent in the Pacific Ocean within the longitudes and latitudes aforesaid, and also including Lord Howe Island, being in or about thirty-one degrees thirty minutes south, and the one hundred and fifty-ninth degree of east longitude, save and except those parts of our said territory of Australia or New Holland which are called respectively 'The State of South Australia', 'The State of Victoria,' and 'The State of Queensland', in the said Commonwealth and that appointments to the said Office shall be made by Commission under Our Sign Manual and Signet.

II. We do hereby authorize, empower, and command Our said Governor to do and execute all things that belong to his said Office,[1] according to the tenor of these Our Letters Patent and of such Commission, as may be issued to him under Our Sign Manual and Signet,[2] and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet, or by Our Order

[1] In the case of Western Australia Clause III then runs, 'and to exercise the powers and authorities vested in him by the *Western Australia Constitution Act*, 1890, or by any other Act adding to, amending, or substituted for the same, or by these Our Letters Patent and by such commission' (&c.).

[2] In the case of Queensland are added the words, 'and by a certain Order made by Us in our Privy Council, bearing date the sixth day of June, 1859.' It is

in Our Privy Council, or by Us, through one of Our Principal Secretaries of State, and to such Laws as are now or shall hereafter be in force in the State.

III. We do also by these Our Letters Patent declare Our will and pleasure as follows :— [1]

IV. Every person appointed to fill the Office of Governor shall, with all due solemnity, before entering on any of the duties of his Office, cause the Commission appointing him to be Governor to be read and published at the seat of Government, in the presence of the Chief Justice, or some other Judge of the Supreme Court of the State,[2] and of the Members of the Executive Council thereof, which being done, he shall then and there take before them the Oath of Allegiance, in the form provided by an Act passed in the Session holden in the Thirty-first and Thirty-second years of Our Reign, intituled an Act to amend the Law relating to Promissory Oaths ; and likewise the usual Oath for the due execution of the Office of Governor, and for the due and impartial administration of justice ; which Oaths the said Chief Justice or Judge is hereby required to administer.

V.[3] The Governor shall keep and use the Public Seal of the State for sealing all things whatsoever that shall pass the said Public Seal, and until a Public Seal shall be provided for the State, the Great Seal formerly used for [4] Our Colony of New South Wales shall be used as the Public Seal of the State.

VI. There shall be an Executive Council for the State, and the said Council shall consist of such persons as were immediately before the coming into force of these Our Letters Patent Members of the Executive Council of New South Wales or as may at any time be Members of the Executive Council of Our said State in accordance with any law enacted by the Legislature of the State, and of such other persons as the Governor shall, from time to time, in Our name and in Our behalf, but subject to any Law as aforesaid, appoint under the Public Seal of the State to be members of Our said Executive Council for the State.[5]

VII. The Governor, in Our name and on Our behalf, may make and execute, under the said Public Seal, grants and dispositions of any lands which may be lawfully granted and disposed of by Us within the State.[6]

not clear in either case why the variation is made, nor is any useful purpose served by it. The Order in Council has long since been adopted and modified by Queensland legislation (see 31 Vict. No. 38, and amending Acts).

[1] In the case of Queensland and South Australia this clause is not inserted, and Clause IV appears as XII.

[2] 'Or the next Superior Judge of the State' (Queensland and South Australia)

[3] Clause III in Queensland ('And we do hereby authorize our said Governor to') and South Australia, VI in Western Australia.

[4] 'In' in Victoria, Tasmania, South and Western Australia.

[5] IV, Queensland and South Australia ; VII, Western Australia.

[6] V, Queensland and South Australia ; VIII, Western Australia, which reads,

VIII. The Governor may constitute and appoint in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace and other necessary Officers and Ministers of the State as may be lawfully constituted or appointed by Us.[1]

IX. When any crime or offence has been committed within the State against the laws of the State, or for which the offender may be tried therein,[2] the Governor may as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, may grant to any offender convicted in any Court of the State, or before any Judge, or other Magistrate of the State, within the State, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such period as the Governor thinks fit; and further may remit any fines, penalties, or forfeitures due or accrued to Us: Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself or be removed from the State.[3]

X. The Governor may, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, remove from his office, or suspend from the exercise of the same, any person exercising any office or place under the State, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us, in Our name, or under Our authority.[4]

XI. The Governor may exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving any Legislative Body, which now is or hereafter may be established within Our said State,[5] and in respect of the appointment of Members thereto.[6]

XII. In the event of the death, incapacity, or removal of the Governor, or of his departure from the State, *or of his assuming the administration of the Government of the Commonwealth of Australia*,[7] Our Lieutenant-Governor, or, if there be no such Officer in the State,

'any lands within the State subject to the laws in force for the time being for regulating the sale or disposal of Crown lands.'

[1] IX, Western Australia; VI, Queensland and South Australia. The power of appointment, as of dismissal (X), is statutory, but this clause allows the use of the royal name.

[2] Such crimes would be tried as a rule by State Courts under Admiralty jurisdiction, as to which the Commonwealth Parliament has not yet legislated.

[3] X, Western Australia; VII, Queensland and South Australia.

[4] XI, Western Australia; VIII, Queensland and South Australia.

[5] XII, Western Australia; IX, Queensland and South Australia.

[6] Not in Victoria, South Australia, or Tasmania. In Western Australia they are now otiose, as the Council has ceased to be nominee.

[7] The words in italics apply to New South Wales only, and were added by letters patent of Dec. 1, 1909, because it was known that the Governor would have occasion to administer the Government of the Commonwealth.

then such person or persons as we may appoint, under Our Sign Manual and Signet, shall, during Our pleasure, administer the Government of the State, first taking the Oaths hereinbefore directed to be taken by the Governor, and in the manner herein prescribed; which being done, We do hereby authorize, empower, and command Our Lieutenant-Governor, and every other such Administrator as aforesaid, to do and execute during Our pleasure all things that belong to the Office of Governor according to the tenor of these Our Letters Patent, and according to Our Instructions as aforesaid, and the laws of the State.

XIII. In the event of the Governor having occasion to be temporarily absent for a short period from the Seat of Government or from the State, *except for the purpose of administering the Government of Our Commonwealth of Australia*,[1] he may in every such case, by an Instrument under the Public Seal of the State, constitute and appoint Our Lieutenant-Governor, or if there be no such Officer or if such Officer be absent or unable to act, then any other person, to be his Deputy during such temporary absence, and in that capacity to exercise, perform, and execute for and on behalf of the Governor during such absence, but no longer, all such powers and authorities vested in the Governor, by these Our Letters Patent, as shall in and by such Instrument be specified and limited, but no others. Provided, nevertheless, that by the appointment of a Deputy as aforesaid, the power and authority of the Governor shall not be abridged, altered, or in any away affected, otherwise than We may at any time hereafter think proper to direct.[2]

[1] The words in italics apply to New South Wales only, and were added by letters patent of December 1, 1909, because it was known that the Governor would have occasion to administer the Government of the Commonwealth.

[2] This form is adopted in the case of Victoria and Tasmania, and also in Western Australia, except that the clauses are XIII and XIV, and XIII begins, 'In the event of the office of the Governor becoming vacant, or of the Governor being incapable, or of his departure from the state.' In the case of Queensland and South Australia the form is different, viz. :—

'X. In the event of the death, incapacity, or removal of the Governor, or of his departure from the State, all the powers and authorities herein granted to him shall (subject to the proviso and condition hereinafter contained) be vested during Our pleasure in Our Lieutenant-Governor of the State, or if there be no such Officer in the State, then in such person or persons as may be appointed by Us under Our Sign Manual and Signet to administer the Government of the State. And We do hereby (subject as aforesaid) give and grant all such powers and authorities to such Lieutenant-Governor or person or persons accordingly. Provided always and subject to this condition that before any such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, he or they shall have taken the Oaths hereinafter directed to be taken by the Governor of the State, and in the manner by these Letters Patent provided.

XI. And whereas it may be necessary or expedient that the Governor should absent himself occasionally for a short period from the seat of Government or from the State, whereby the affairs of the State might be exposed to detriment if there were no person on the spot authorized to exercise the powers and authorities by these Our Letters Patent granted to the Governor or some of them: Now We do hereby authorize and empower the Governor, in every such case as occasion shall require, by an Instrument under the Public Seal of the State, to constitute and appoint Our Lieutenant-Governor for the time

XIV. And We do hereby require and command all Our Officers and Ministers, and all other the inhabitants of the State, to be obedient, aiding, and assisting unto the Governor, or to such person or persons as may from time to time, under the provisions of these Our Letters Patent, administer the Government of the State.[1]

XV. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.[2]

XVI. And We do direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places within the State as the Governor shall think fit.[3]

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the twenty-ninth day of October, in the Sixty-fourth year of Our reign.

By Warrant under the Queen's Sign Manual.

MUIR MACKENZIE.

II

INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor of the State of New South Wales and its Dependencies in the Commonwealth of Australia.

Dated October 29, 1900.

VICTORIA R. I.

INSTRUCTIONS to Our Governor in and over Our State of New South Wales and its Dependencies, in the Commonwealth of Australia or to Our Lieutenant-Governor, or other Officer for the time being administering the Government of Our said State and its Dependencies.

Given at Our Court at Saint James's, this Twenty-ninth day of October 1900, in the Sixty-fourth year of Our reign.

WHEREAS by certain Letters Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor in and over Our State of New South Wales and its Dependencies in the Commonwealth of Australia (which said State of New South Wales and its Dependencies are therein and hereinafter called the State) :

being of the State, or if there be no such Officer, or if such Officer be absent or unable to act, then any other person, to be his Deputy in the State during such temporary absence, and in that capacity to exercise, perform, and execute for and on behalf of the Governor during such absence, but no longer, all such powers and authorities vested in the Governor, by these Our Letters Patent, as shall in and by such Instrument be specified and limited, but no others. Provided, nevertheless, that by the appointment of a Deputy as aforesaid, the power and authority of the Governor of the State shall not be abridged, altered, or in any way affected, otherwise than We may at any time hereafter think proper to direct.

[1] XV, Western Australia ; XIII, Queensland and South Australia.
[2] XVI, Western Australia ; XIV, Queensland and South Australia.
[3] XVII, Western Australia ; XV, Queensland and South Australia.

And whereas We have thereby authorized and commanded the Governor to do and execute all things that belong to his said office, according to the tenor of Our said Letters Patent, and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet or by Our Order in Our Privy Council or by Us through one of Our Principal Secretaries of State, and to such laws as are now or shall hereafter be in force in the State :

And whereas We did issue certain Instructions under Our Sign Manual and Signet to Our Governor and Commander-in-Chief in and over Our Colony of New South Wales and its Dependencies, bearing date the Ninth day of July 1892.

Now know you that We do hereby revoke the aforesaid Instructions, and We do by these Our Instructions under Our Sign Manual and Signet direct and enjoin and declare Our will and pleasure as follows :—

I. In these Our instructions, unless inconsistent with the context, the term ' the Governor ' shall include every person for the time being administering the Government of the State, *and the term ' Executive Council ' shall mean the members of Our Executive Council for the State who are for the time being the responsible advisers of the Governor.*[1]

II. The Governor may, whenever he thinks fit, require any person in the public service to take the Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any law in force in the State. The Governor is to administer such oaths or cause them to be administered by some Public Officer of the State.

III. The Governor shall forthwith communicate these Our Instructions to the Executive Council, and likewise all such others, from time to time, as he shall find convenient for Our service to impart to them.

IV. The Governor shall attend and preside at the meetings of the Executive Council, unless prevented by some necessary or reasonable cause, and in his absence such member as may be appointed by him in that behalf, or in the absence of such member the senior member of the Executive Council actually present shall preside ; the seniority of the members of the said Council being regulated according to the order of their respective appointments as members thereof.

V. The Executive Council shall not proceed to the dispatch of business unless duly summoned by authority of the Governor nor unless two members at the least (exclusive of the Governor or of the member presiding) be present and assisting throughout the whole of the meetings at which any such business shall be dispatched.

VI. In the execution of the powers and authorities vested in him,

[1] The words in italics occur only in the Victorian instructions. It is curious that they do not also occur in the Tasmanian instruments, as there also the Executive Council contains ex-members. See also, p. 1590, n. 2.

the Governor shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council, he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the matter to Us without delay, with the reasons for his so acting.

In any such case it shall be competent to any Member of the said Council to require that there be recorded upon the Minutes of the Council the grounds of any advice or opinion that he may give upon the question.

VII. *The Governor, with the advice of the Executive Council,*[1] *is hereby authorized, from time to time, in Our name by an Instrument or Instruments under the Public Seal of the State, to summon to the Legislative Council of the State such person or persons as the Governor and Executive Council shall think fit, in accordance with the provisions of an Act passed in the Session of Parliament holden in the Eighteenth and Nineteenth years of Our Reign, intituled an Act to enable Her Majesty to assent to a Bill, as amended, of the Legislature of New South Wales 'to confer a Constitution on New South Wales, and to grant a Civil List to Her Majesty'.*

VIII.[2] The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Bill of any of the following classes :—

1. Any Bill for the divorce of persons joined together in holy matrimony.
2. Any Bill whereby any grant of land or money, or other donation or gratuity, may be made to himself.
3. Any Bill affecting the currency of the State.
4. Any Bill, the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.
5. Any Bill of an extraordinary nature and importance, whereby Our prerogative, or the rights and property of Our subjects not residing in the State or the trade and shipping of the United Kingdom and its Dependencies may be prejudiced.
6. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us ;

Unless he shall have previously obtained Our Instructions upon such Bill through one of Our Principal Secretaries of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification in the State of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill, unless the same shall be repugnant to the law of England,

[1] This clause is peculiar to New South Wales ; it is not in exact accordance with the local Act No. 32 of 1902, s. 16, but it agrees with the Imperial Act, 18 & 19 Vict. c. 54, sched. s. 2, now repealed.

[2] VII, and so on in all the other cases.

or inconsistent with any obligations imposed upon Us by Treaty. But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto.[1]

IX. The Governor shall not pardon or reprieve any offender without first receiving in capital cases the advice of the Executive Council, and in other cases the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of the State, the Governor shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

X. All Commissions granted by the Governor to any persons to be Judges, Justices of the Peace, or other officers, shall, unless otherwise provided by law, be granted during pleasure only.

XI. The Governor shall not quit the State without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State, *except for the purpose of administering the Government of Our Commonwealth of Australia or*[2] for the purpose of visiting the Governor of any neighbouring State of the Governor-General for periods not exceeding one month at any one time, nor exceeding in the aggregate one month for every year's service in the State.

XII. The temporary absence of the Governor for any period not exceeding one month shall not, if he have previously informed the Executive Council, in writing, of his intended absence, and if he have duly appointed a Deputy in accordance with Our said Letters Patent, be deemed a departure from the State within the meaning of the said Letters Patent.

V. R. I.

III

COMMISSION under the Royal Sign Manual and Signet, appointing the Governor.

(This form of Commission is similar to that used in the case of Canada.)

IV

DORMANT COMMISSION under the Royal Sign Manual and Signet appointing the Chief Justice or the Senior Judge for the time being to administer the Government in the event of the death, incapacity, or absence of the Governor and Lieutenant-Governor (if any).

Dated October 29, 1900.

(The form is similar to that used in the case of New Zealand.)

[1] See now also 7 Edw. VII. c. 7.

[2] The words in italics were added in the case of New South Wales only by the instructions of December 1, 1909.

V

COMMISSION passed under the Royal Sign Manual and Signet, appointing William Portus Cullen, Esq., LL.D., Chief Justice of the Supreme Court of New South Wales, to be Lieutenant-Governor of the State of New South Wales and its Dependencies, in the Commonwealth of Australia.

Dated March 30, 1910.

EDWARD R. & I.

Edward the Seventh, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India : To Our Trusty and Well-beloved William Portus Cullen, Esquire, Doctor of Laws, Chief Justice of the Supreme Court of New South Wales : Greeting.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said William Portus Cullen, to be, during Our pleasure, Our Lieutenant-Governor of Our State of New South Wales and its Dependencies, in the Commonwealth of Australia, with all the powers, rights, privileges, and advantages to the said Office belonging or appertaining.

II. And further in case of the death, incapacity, or removal of Our Governor of Our said State, or of his departure from Our said State, or of his assuming the administration of the Government of Our Commonwealth of Australia, We do hereby authorize and require you to administer the Government of Our said State of New South Wales, with all and singular the powers and authorities contained in certain Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-ninth day of October 1900, constituting the Office of Governor in and over Our said State of New South Wales and its Dependencies, and in Our Letters Patent under the said Great Seal, bearing date at Westminster the First day of December 1909, amending the same, or in any other Our Letters Patent adding to, amending, or substituted for the same, and according to such Instructions as Our said Governor for the time being may have received, or may hereafter receive from Us or through one of Our Principal Secretaries of State, and according to such laws as are now or shall hereafter be in force in Our said State.

III. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said State and its Dependencies, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at Our Court at Saint James's, this Thirtieth day of March, 1910, in the Tenth year of Our Reign.

By His Majesty's Command,

CREWE.

NEWFOUNDLAND

In the case of Newfoundland the instruments are of special interest as being of the older type, the first permanent letters patent and instructions being still valid and in force. There are also the usual commission and a dormant commission to the Chief Justice. The two latter are in the usual form.

I

LETTERS PATENT passed under the Great Seal of the United Kingdom, constituting the Office of Governor and Commander-in-Chief of the Island of Newfoundland and its Dependencies.

Letters Patent, Dated March 28, 1876.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith : To all to whom these Presents shall come, Greeting :

WHEREAS We did, by certain Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Sixth day of September, 1869, in the Thirty-Third Year of Our Reign, constitute and appoint Our Trusty and Well-beloved Colonel Stephen John Hill (now Sir Stephen John Hill, Knight Commander of Our Most Distinguished Order of Saint Michael and Saint George), Companion of Our Most Honourable Order of the Bath, to be, during Our pleasure, Our Governor and Commander-in-Chief in and over Our Island of Newfoundland and its Dependencies. And whereas We are desirous of making effectual and permanent provision for the Office of Governor and Commander-in-Chief in and over Our said Island of Newfoundland and its Dependencies without making new Letters Patent on each demise of the said Office : Now know ye that We have revoked and determined, and by these presents do revoke and determine, the said recited Letters Patent, and every clause, article, and thing therein contained : And further know ye, that We, of Our special grace, certain knowledge and mere motion, have thought fit to constitute, order, and declare, and do by these presents constitute, order, and declare, that there shall be a Governor and Commander-in-Chief (hereinafter called Our said Governor) in and over Our Island of Newfoundland, and the Islands adjacent, and all the Coast of Labrador from the entrance of Hudson's Straits to a line to be drawn due North and South, from Anse Sablon on the said Coast to the Fifty-Second Degree of North Latitude, and all the Islands adjacent to that part of the said Coast of Labrador, as also of all Forts and Garrisons erected and established,

or which shall be erected or established within or on the Islands and Coast aforesaid (which said Islands and Coast, together with the Island of Newfoundland, are hereinafter referred to as Our said Colony), and that the person who shall fill the said Office of Governor shall be, from time to time, appointed by Commission under Our Sign Manual and Signet. And We do hereby authorize and command Our said Governor to do and execute in due manner all things that shall belong to his said Command, and to the trust We have reposed in him, according to the several Powers and Authorities granted or appointed him by virtue of these present Letters Patent, and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and according to such Laws and Ordinances as are or shall hereafter be in force in Our said Colony.

II. And We do hereby declare Our pleasure to be that there shall be an Executive Council for Our said Colony, and that the said Council shall consist of such persons as are now or may at any time be declared by any law enacted by the Legislature of Our said Colony to be Members of Our said Council, and of such other persons as Our said Governor shall, from time to time, in Our name and on Our behalf, but subject to any law as aforesaid, appoint under the Public Seal to be Members of Our said Council.

III. And We do hereby declare Our pleasure to be that there shall be within Our said Colony a Legislative Council which shall consist of such members as at or immediately before the publication of these presents were members of Our said Council, and of such and so many other members as shall hereafter be from time to time nominated and appointed by Us under Our Sign Manual and Signet, or provisionally appointed by Our said Governor until Our pleasure thereon shall be known: Provided, nevertheless, and We do hereby declare Our pleasure to be, that the total number of the members of the said Legislative Council for the time being resident within Our said Colony shall not at any time, by such provisional appointments, be raised to a greater number in the whole than fifteen: Provided also that every member of Our said Council shall hold his place therein during Our pleasure, and shall be removable by any instruction or warrant issued by Us under Our Sign Manual and Signet, and with the advice of Our Privy Council.

IV. And We do authorize and empower Our said Governor, with the advice and consent of Our said Executive Council, by writs issued in Our name, to summon and call together the General Assembly of Our said Colony, and also from time to time, in the lawful and accustomed manner, to prorogue the Legislative Council and the House of Assembly of Our said Colony, and from time to time to dissolve the said House of Assembly.

V. And we do further authorize and empower Our said Governor,

with the advice and consent of the said Legislative Council and Assembly of Our said Colony, to make laws for the public peace, welfare, and good government of Our said Colony.

VI. And We do further authorize and empower Our said Governor to keep and use the Public Seal of Our said Colony for sealing all things whatsoever that shall pass the said Public Seal.

VII. And We do further authorize and empower Our said Governor, in Our name and on Our behalf, to make and execute, under the said Seal, grants and dispositions of any lands which may be lawfully granted or disposed of by Us within Our said Colony.

VIII. And We do further authorize and empower Our said Governor to constitute and appoint in Our name and on Our behalf all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers in Our said Colony as may be lawfully constituted or appointed by Us.

IX. And We do further authorize and empower Our said Governor, as he shall see occasion, in Our name and on Our behalf, when any crime has been committed within Our said Colony, or for which the offender may be tried therein, to grant a pardon to any accomplice, not being the actual perpetrator of such crime, who shall give such information and evidence as shall lead to the apprehension and conviction of the principal offender; and further, to grant to any offender convicted of any crime in any Court, or before any Judge, Justice, or Magistrate, within Our said Colony, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our said Governor may seem fit, and to remit any fines, penalties, or forfeitures, which may become due and payable to Us. Provided always that Our said Governor shall in no case make it a condition of any pardon or remission of sentence that the offender shall be banished from, or shall absent himself from Our said Colony.

X. And We do further authorize and empower Our said Governor, so far as We lawfully may, upon sufficient cause to him appearing, to remove from his office, or to suspend from the exercise of the same, any person exercising any such office or place within Our said Colony, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us in Our name, or under Our authority.

XI. And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence of Our said Governor out of Our said Colony, all and every the powers and authorities herein granted to you shall, until Our further pleasure is signified therein, be, and the same are hereby vested in such person as may be appointed by Us under Our Sign Manual and Signet, to be Our Lieutenant-Governor of Our said Colony, or if there shall be no such Lieutenant-Governor in Our said Colony, then in such person or persons as may be appointed by Us under Our Sign Manual and Signet to administer the Government of the same; and, in case there shall be no person or persons within Our said Colony so appointed by Us,

then in the President for the time being of the Legislative Council of Our said Colony.

XII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other inhabitants of Our said Colony, to be obedient, aiding, and assisting unto Our said Governor, or, in the event of his death, incapacity, or absence, to such person or persons as may from time to time, under the provisions of these Our Letters Patent, administer the Government of Our said Colony.

XIII. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.

XIV. And We do further direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places as Our said Governor shall think fit within Our said Colony of Newfoundland.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the 28th day of March, in the Thirty-ninth year of Our Reign.

By Warrant under the Queen's Sign Manual.

C. ROMILLY.

Clause XI is amended by letters patent of July 17, 1905, to read as follows :—

XI. In the event of the death, incapacity, removal, or absence of Our said Governor out of Our said Colony, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be, and the same are hereby vested in such person as may be appointed by Us under Our Sign Manual and Signet, to be Our Lieutenant-Governor of Our said Colony, or if there shall be no such Lieutenant-Governor in Our said Colony, then in such person or persons as may be appointed by Us under Our Sign Manual and Signet to administer the Government of the same ; and in case there shall be no person or persons within Our said Colony so appointed by Us, then in the President for the time being of the Legislative Council of Our said Colony.

Provided that, in the event of Our said Governor having occasion to be temporarily absent for a short period from the seat of Government, or from Our said Colony for the purpose of visiting Our Dominion of Canada on public business, he may in every such case by an Instrument under the Public Seal of Our said Colony, constitute and appoint Our Lieutenant-Governor, or if there be no such Officer or if such Officer be absent or unable to act, then any other person, to be his Deputy during such temporary absence, and in that capacity to exercise, perform, and execute for and on his behalf during such absence, but no longer, all such powers and authorities vested in Our said Governor, by these Our Letters Patent, as shall in and by such Instrument be specified and limited, but no others. Every

such Deputy shall conform to and observe all such instructions as Our said Governor shall from time to time address to him for his guidance. Provided, nevertheless, that by the appointment of a Deputy as aforesaid, the power and authority of Our said Governor shall not be abridged, altered, or in any way affected, otherwise than We may at any time hereafter think proper to direct. Provided further that if any such Deputy shall have been duly appointed it shall not be necessary during the continuance in office of such Deputy for any person to assume the Government of Our said Colony as Administrator thereof.

II

INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor and Commander-in-Chief of the Island of Newfoundland and its Dependencies.

Dated March 28, 1876.

VICTORIA R.

Instructions to Our Governor and Commander-in-Chief in and over Our Island of Newfoundland and its Dependencies, or, in his absence, to Our Lieutenant-Governor, or the Officer Administering the Government of Our said Island and its Dependencies for the time being.

Dated this 28th day of March, 1876, in the thirty-ninth year of Our Reign.

WHEREAS by certain Letters Patent, bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor and Commander-in-chief (hereinafter called Our said Governor) in and over Our Island of Newfoundland and its Dependencies (hereinafter called Our said Colony). And We have thereby authorized and commanded Our said Governor to do and execute in due manner all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the said Letters Patent and of the Commission to be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through One of Our Principal Secretaries of State, and according to such Laws and Ordinances as are or shall hereafter be in force in Our said Colony. Now, therefore, We do by these Our Instructions under Our Sign Manual and Signet, declare Our pleasure to be, that Our said Governor for the time being shall with all due solemnity cause Our Commission under Our Sign Manual and Signet, appointing Our said Governor for the time being, to be read and published in the presence of the Chief Justice of Our said Colony for the time being, and of the Members of Our Executive Council thereof; and We do further declare Our pleasure to be that Our said Governor and every other

officer appointed to administer the Government of Our said Colony shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled ' An Act to amend the Law relating to Promissory Oaths ' ; and likewise that he or they take the usual oath for the due execution of the office and trust of Our Governor and Commander-in-chief in and over Our said Colony, and for the due and impartial administration of justice, which said oaths the Chief Justice for the time being of Our said Colony, or, in his absence, or in the event of his being otherwise incapacitated, the Senior Judge then present, or, failing such Judge, the Senior Member present of Our said Executive Council, shall and he is hereby required to tender and administer unto him or them.

II. And We do authorize and require Our said Governor, from time to time, and at any time hereafter, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every persons or person, as he shall think fit, who shall hold any office or place of trust or profit, the said Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any Laws or Statutes in that behalf made and provided.

III. And We do require Our said Governor to communicate forthwith to Our Executive Council for Our said Colony these Our Instructions, and likewise all such others from time to time as he shall find convenient for Our service to be imparted to them.

IV. And We do hereby direct and enjoin that Our said Executive Council shall not proceed to the dispatch of business unless duly summoned by authority of Our said Governor, and unless three Members at the least (exclusive of himself or the Member presiding) be present and assisting throughout the whole of the meetings at which any such business shall be dispatched.

V. And We do further direct and enjoin that Our said Governor do attend and preside at the meetings of Our said Executive Council, unless when prevented by some necessary or reasonable cause ; and that in his absence such Member as may be appointed by him in that behalf, or, in the absence of any such Member, the Senior Member of the said Executive Council actually present shall preside at all such meetings, the seniority of the Members of the Council being regulated according to the order of their respective appointments as Members of Our said Council.

VI. And We do further direct and enjoin that a full and exact Journal or Minute be kept of all the deliberations, acts, proceedings, votes, and resolutions of Our said Executive Council, and that at each meeting of the said Council the Minutes of the last meeting be read over, confirmed, or amended, as the case may require, before proceeding to the dispatch of any other business. And We do further direct that twice in each year a full transcript of all the Minutes of the said Council for the preceding half year be transmitted to Us through one of our Principal Secretaries of State.

VII. And We do further direct and enjoin that, in the execution of the powers and authorities committed to Our said Governor by Our said Letters Patent, he shall in all cases consult with Our said Executive Council, excepting only in cases which may be of such a nature that, in his judgement, Our service would sustain material prejudice by consulting Our Council thereupon, or when the matters to be decided shall be too unimportant to require their advice, or too urgent to admit of their advice being given by the time within which it may be necessary for him to act in respect of any such matters. Provided that in all such urgent cases he shall subsequently, and at the earliest practicable period, communicate to the said Executive Council the measures which he may so have adopted, with the reasons thereof.

VIII. And We do authorize Our said Governor, in his discretion, and if it shall in any case appear right, to act in the exercise of the power committed to him by Our said Letters Patent, in opposition to the advice which may in any such case be given to him by the Members of Our said Executive Council. Provided, nevertheless, that in every such case he shall fully report to Us by the first convenient opportunity such proceeding with the grounds and reasons thereof.

IX. And whereas We have by Our said Letters Patent provided that the Legislative Council of Our said Colony shall be constituted in the manner therein appointed: Now We do declare Our pleasure to be that Five Members of the said Legislative Council shall be a quorum for the dispatch of the business thereof.

X. And We do authorize and empower Our said Governor, from time to time, by an Instrument under the Public Seal of Our said Colony, to appoint one Member of the said Legislative Council to preside therein, and to remove him and appoint another in his stead.

XI. And We do confirm all Standing Rules and Orders heretofore made by Our authority for ensuring punctuality of attendance of the Members of the said Legislative Council, and for the prevention of meetings of the said Council being held without convenient notice to the several Members thereof, and for maintaining order and method in the dispatch of business, and in the conduct of all debates in the said Council; and We do authorize and empower the said Legislative Council to make such other and further Rules and Orders as may to them appear requisite for the above-mentioned purposes, not being repugnant to these Our Instructions, or to any other Instructions which Our said Governor may receive from Us.

XII. And We do further direct and enjoin that Minutes shall be regularly kept of the proceedings of the said Legislative Council, and that at each meeting of the said Council the Minutes of the last preceding meeting be read over, confirmed, or amended, as the case may require, before proceeding to the dispatch of any other business. And We do further direct and enjoin that Our said Governor shall transmit fair copies of the Journals and Minutes of the proceedings

of the Legislative bodies of Our said Colony, which he is to require from the Clerks or other proper Officers in that behalf of the said Legislative Bodies.

XIII. And whereas We have empowered Our said Governor, by Our said Letters Patent, to summon and call together the General Assembly of Our said Colony, We do further direct and enjoin that the persons thereupon duly elected to be Members of the said Assembly shall, before their sitting, take the said Oath of Allegiance, which Oath he shall commission fit persons, under the Seal of Our said Colony, to tender and administer unto them ; and until the same shall be so taken, no person shall be capable of sitting though elected.

XIV. And in the enactment of Laws within Our said Colony, We do direct and enjoin that Our said Governor observes, as far as may be practicable, the following Rules and Instructions (that is to say) :—

XV. The style of enacting such laws shall be by ' The Governor, Lieutenant-Governor, or Officer Administering the Government (as the case may be), Council and Assembly ', and no other.

XVI. In the passing of all laws, each different matter is to be provided for by a different law, without intermixing in one and the same law such things as have no proper relation to each other, and no Clause is to be inserted in or annexed to any Law which shall be foreign to what the title of such Law imports, and no perpetual clause is to be part of any temporary Law.

XVII. Our said Governor is not to assent in Our name to any Bill of any of the classes hereinafter specified, that is to say :—

1. Any Bill for the divorce of persons joined together in Holy Matrimony.

2. Any Bill whereby any grant of Land or money or other donation or gratuity may be made to himself.

3. Any Bill whereby any paper or other currency may be made a legal tender, except the coin of the realm or other gold or silver coin.

4. Any Bill imposing differential duties.

5. Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.

6. Any Bill interfering with the discipline or control of Our forces in Our said Colony by land and sea.

7. Any Bill of an extraordinary nature and importance, whereby Our prerogative, or the rights and property of our subjects not residing in Our said Colony, or the trade and shipping of the United Kingdom and its dependencies, may be prejudiced.

8. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us :—

Unless such Bill shall contain a clause suspending the operation of such Bill until the signification in Our said Colony of Our pleasure thereupon, or unless Our said Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill unless the same shall be repugnant to the law

of England, or inconsistent with any obligations imposed upon Us by Treaty. But he is to transmit to us, by the earliest opportunity, the Bill so assented to, together with his reasons for assenting thereto.

XVIII. And We do further direct and enjoin Our said Governor to transmit to Us, through one of Our Principal Secretaries of State, a transcript in duplicate of every Law which has been assented to by him in Our name, together with a marginal abstract thereof duly authenticated under the Public Seal of Our said Colony, and that such transcript shall be accompanied with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws; and that in case any such law shall at any time be disallowed, and so signified by Us, Our Heirs and Successors, under Our or their Sign Manual and Signet, or by Order of Our or their Privy Council unto him, then such Law as shall be so disallowed shall from thenceforth cease, determine, and become utterly void and of none effect, anything to the contrary thereof notwithstanding.

XIX. And whereas We have by Our said Letters Patent authorized and empowered our said Governor, as he shall see occasion, in Our name and on Our behalf, to grant to any offender convicted of any crime in any Court, or before any Judge, Justice, or Magistrate within Our said Colony, a pardon, either free or subject to lawful conditions: Now We do hereby direct and enjoin Our said Governor to call upon the Judge who presided at the trial of any offender who shall have been condemned to suffer death by the sentence of any Court within Our said Colony to make to Our said Governor a written report of the case of such offender, and such report of the said Judge shall by Our said Governor be taken into consideration at the first meeting thereafter which may be conveniently held of Our said Executive Council, where the said Judge may be specially summoned to attend; and Our said Governor shall not pardon or reprieve any such offender as aforesaid, unless it shall appear to him expedient so to do, upon receiving the advice of Our Executive Council therein, but in all such cases he is to decide either to extend or to withhold a pardon or reprieve, according to his own deliberate judgement, whether the Members of Our said Executive Council concur therein or otherwise; entering, nevertheless, on the Minutes of the said Council a Minute of his reasons at length, in case he should decide any such questions in opposition to the judgement of the majority of the Members thereof.

XX. And We do further direct and enjoin that all Commissions granted by Our said Governor to any person or persons to be Judges, Justices of the Peace, or other officers, shall, unless otherwise provided by law, be granted during pleasure only.

XXI. And whereas Our said Governor will receive through one of Our Principal Secretaries of State a Book of Tables in Blank, commonly called the 'Blue Book', to be annually filled up with certain Returns, relative to the Revenue and Expenditure, Militia, Public Works, Legislation, Civil Establishment, Pensions, Population, Schools, Course of Exchange, Imports and Exports, Agricultural

Produce, Manufactures, and other matters in the said 'Blue Book' more particularly specified with reference to the state and condition of Our said Colony: Now We do hereby direct and enjoin that all such Returns be accurately prepared, and punctually transmitted to Us from year to year through one of Our Principal Secretaries of State.

XXII. And whereas great prejudice may happen to Our Service and to the security of Our said Colony by the absence therefrom of Our said Governor, he shall not upon any pretence whatsoever quit Our said Colony without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State.

V. R.

The powers given in the Letters Patent are not all revocable; that in Clauses IV and V could not be withdrawn save by Act of Parliament or local Act since it was first conferred in 1832 by Commission to the Governor.[1] No power is given in regard to marriage licences, letters of administration, probate of wills, or the custody and management of lunatics and idiots and their estates, as was done in two of the Australian Letters Patent up to 1900.[2]

[1] *Campbell* v. *Hall*, Cowp. 204; above, p. 3. Cf. *Parl. Pap.*, H. C. 229, sess. 2, 1857, p. 3.

[2] South Australia and Queensland. In the others and in New Zealand it disappeared when permanent letters patent were issued, and in the case of Canada on confederation. The Newfoundland form omits in the Instructions the injunction contained in the Australasian Instructions up to 1892 that the Governor should promote the interests of the natives and guard them from oppression. No power of presentation to benefices is included, as in Canada up to federation and in the first Queensland commission in 1859. Cf. *ex parte Jenkins*, 2 P. C. 258; New Brunswick Act 32 Vict. c. 6.

ADDENDA

PAGE 8. For the Acts regulating the government of South Australia, see 4 & 5 Will. IV. c. 59, 1 & 2 Vict. c. 60, 5 & 6 Vict. c. 61, 13 & 14 Vict. c. 59, s. 8; for Western Australia, see 10 Geo. IV. c. 22, continued by 9 & 10 Vict. c. 35, 13 & 14 Vict. c. 59, s. 9; Orders in Council, March 20, 1857, March 3, 1859, October 11, 1861, May 14, 1868 (six officials, six non-officials nominated in Order); Act 33 Vict. No. 13; 37 Vict. No. 22; 46 Vict. No. 24; 50 Vict. No. 10.

PAGE 136. Cockburn's charge was in *R.* v. *Nelson and Brand* (published, 1867); that in *R.* v. *Eyre* was by Blackburn J.

PAGE 200. The Governor's action in 1909 was discussed very energetically in the Assembly on September 28, 1911; see *Mercury*, September 29; *Examiner*, September 29 and 30. But the constitutionality of his action was defended warmly by the Premier.

PAGE 209. See Newfoundland Assembly *Journals*, 1909, p. 342. The correspondence was printed in Newfoundland; cf. McGrath, *Newfoundland in 1911*, pp. 60–3.

PAGE 220, n. 1. The question of the effect of the contract with the company came before the Supreme Court in the case of *The Attorney-General of Newfoundland* v. *The Commercial Cable Co.* The Government claimed 16,000 dollars in respect of four cables of the company under the Act 5 Edw. VII. c. 7, s. 2, while the company urged in defence that by the contract of 1909 a cable running to the company's station in Newfoundland and then again to sea was to be reckoned for the tax as one cable. The Court refused to allow the Act to be set aside by a contract unratified by the Legislature; see *Royal Gazette*, October 17, 1911.

PAGE 223. The relation of the Governor and ministers has been recently illustrated by an extraordinary series of events in New South Wales. The Labour party took office in 1910 with a secure majority of two in a house of ninety members, and a probability of steady support from four or five other independent members. The policy of forbidding the acquisition of freehold was adopted, and with it the intention of repealing the Act permitting the conversion of leaseholds was declared by the Minister of Lands. This development raised doubts in the minds of the Independents and also of some of the Ministerialists who represented country districts, and though

in a direct motion of censure on July 25[1] the Government were maintained by a majority of 42 votes to 37, the same date saw the resignation of their seats by Mr. Dunn and Mr. Horne, members for Mudgee and Liverpool Plains.

The result of their resignation was to reduce the number of members of the Assembly to 88, of whom 44 were acknowledged supporters of the Government, leaving the Government with an effective voting strength of 43 only, as one of their members was in the Chair. The Government then decided and announced in the Assembly on July 26[2] that they would not carry on any further business on the ground that while two ordinary by-elections such as those necessitated by the resignation of members would not justify Government in suspending its operations, the position in which the Government were left by the loss of their assured majority rendered it undesirable to proceed further with business until the by-elections had been decided. But the leader of the group of Independents at once made it clear that he was not prepared to allow an adjournment over the period of the elections.

After full consideration, therefore, the Labour Government decided that it would be well to ask the officer administering the government to grant them a prorogation with a view to taking at the by-elections the opinion of the country on the questions at issue, but the Lieutenant-Governor definitely declined to do so, whereupon the Government placed in his hands their resignations, which he accepted conditionally as usual on his being able to find other advisers prepared to undertake the responsibilities of government.[3] Mr. Wade, the Leader of the Opposition and formerly Premier, was then sent for by Sir William Cullen, and was asked if he would undertake the conduct of government. This Mr. Wade was unwilling to do unless the Lieutenant-Governor was prepared to promise him a dissolution, as with parties equal there was no real prospect of his being able to carry on business, especially as the Labour party had deprived him of his potential majority of one by inducing the Speaker to resign his position, so that had he taken office Mr. Wade would have been defeated at any moment the Labour Party chose.[4] The Lieutenant-Governor then recalled to office the outgoing Ministry and granted them, on August 1,[5] a prorogation of Parliament until August 23, to tide over the period of the by-elections.

[1] See *Parliamentary Debates*, 1911, sess. 1, pp. 1813–1914. On the contrary, on July 26 on a motion to suspend the standing orders in order to pass a supply Bill to cover July, August, and September, the Government was only able to bring up 37 members against 37; the Speaker voted with the Government, quoting the precedent of 1889, when, on Sir W. McMillan's motion to postpone consideration of the estimates, the Speaker held that he should not cast his vote in such a way as perhaps to bring about a change of administration; see pp. 1929–51.

[2] *Parliamentary Debates*, pp. 1924 1925.

[3] Ibid., pp. 1998–2001.

[4] See Sydney *Morning Herald* and *Daily Telegraph*, July 31, August 1 and 2, 1911.

[5] *Parliamentary Debates*, p. 2002.

The energies of both parties were thus concentrated upon the by-elections in the two districts ; in one case the Labour member decided to stand again in order to secure the reasoned opinion of his constituents on the question at issue, while in the other case the Labour candidate decided definitely to retire from political life. The whole position was, however, materially altered by the decision of the Government to abandon the policy of the repeal of the Act permitting conversion of leaseholds,[1] and the consequent resignation, on August 1, by Mr. Nielsen of his position as Minister of Lands. It was alleged against the Government during the election contest that their action was unconstitutional in resigning while the Premier [2] was not in the country, an argument which was met by the precedent of 1887, when Sir John Downer's colleagues in South Australia resigned office during his absence in England at the Colonial Conference, and in causing the Speaker to vacate his office for party purposes. The result of the by-elections was disappointing to both sides, for in one seat the Labour [3] and in the other the Liberal candidate (later unseated) succeeded, leaving the parties precisely equal, for the independent members had, during the elections, more or less definitely joined themselves with the Opposition to the Government.

The position was clearly almost an impossible one, as it repeated the famous predicament of Newfoundland in 1909, when there was an equality of members on both sides, and the election of a Speaker presented insuperable difficulties, so that the new House of Assembly had to be dissolved before it had taken any action. But in this case the Labour Government was sufficiently fortunate to secure an Opposition member, who consented to take the Speaker's chair on the understanding that a redistribution of seats would take place in accordance with the Constitution as a result of the census of 1911, and, pending this redistribution and a general election, non-contentious business in the main should be proceeded with. There was naturally much indignation on the part of the Opposition at this action by one of their members, and the election of the Speaker was only carried on August 23,[4] when Parliament reassembled, amidst scenes of the greatest excitement and disorder, and these scenes were renewed on August 29, with the result of the exclusion from the House of two Opposition members. Mr. J. Perry brought an action against the Speaker,[5] and it was alleged that he was not duly appointed to that office on the ground that the proceedings on August 23 were irregular, inasmuch as the Speaker had been installed in the chair while a member of the Opposition was endeavouring to speak

[1] How far it had been adopted by the party was disputed ; see *Parliamentary Debates*, 1911, sess. 2, p. 462.

[2] Mr. McGowen was in England for the Coronation, Mr. Wade having arranged a pair with him. Cf. *Parliamentary Debates*, 1911, sess. 1, p. 1999.

[3] Mr. Dunn. [4] *Parliamentary Debates*, 1911, sess. 2, pp. 2–128.

[5] Ibid., pp. 311 seq. Mr. Wade protested against the Government undertaking automatically the defence of the Speaker, holding that it should be left over for consideration after the result of the action

and to propose another gentleman as Speaker. The ill feeling induced by the incident resulted in the constant occurrence of dissent from the Speaker's rulings, and culminated in a disgraceful scene of disorder on September 19,[1] when seven members of the Assembly were ejected by the police by direction of the Speaker. The Speaker ruled[2] that a motion 'that the Speaker's words accusing him (Mr. Wade) of prevarication be taken down' was out of order, the precedent of 1770 cited by May being deemed by him obsolete, and he also ruled that a motion to censure the Speaker was out of order.[3]

The Lieutenant-Governor's action in refusing a prorogation to the Labour party was severely criticized by certain Labour members, but clearly it was in accordance with constitutional practice that he should not thus do what the Assembly declined to do, if he could find other ministers ready to carry on business. His action in refusing a dissolution to Mr. Wade was also criticized by the Liberal press, and suggestions were made after the election of Mr. Willis as Speaker, that the Lieutenant-Governor should force a dissolution. But the Liberal press on the whole were prepared to agree to a brief continuance of the Government in office if it proceeded energetically with redistribution; an offer to do so and to drop, if possible, contentious measures was made by the Ministry. The Upper House is, of course, by an overwhelming majority opposed to the Government, and declined to accept the Parliamentary Elections Bill so far as it removed the pauper disqualification for the franchise.[4]

Page 291. Lord Carnarvon's dispatch dealt specifically with the position of the Governor-General as to disallowing provincial Acts in Canada. Mr. Blake took up this matter together with the question of the prerogative of mercy. See p. 727.

Page 322. The Government of Sir W. Laurier were decisively defeated at the general election of September 1911, on the issue of reciprocity with the United States, and retired without meeting Parliament. Mr. R. L. Borden then formed a Government, including

[1] See Sydney *Daily Telegraph*, *Morning Herald*, September 20, 1911, which supplement the official report in *Parliamentary Debates*, 1911, sess. 2, pp. 600–6.

[2] *Parliamentary Debates*, 1911, sess. 2, pp. 524, 525.

[3] Ibid., pp. 703–33.

[4] Ibid., pp. 506 seq.; the Government yielded on this point to save delay (pp. 639–41, 733–5), but on September 26 they were challenged by Mr. Wade in a direct motion of censure, but sustained by 32 votes to 30. The Bill thus changed became law as Act No. 9 of 1911. On November 17 the Supreme Court unanimously decided in favour of the plaintiff, Mr. Perry, in an action against the Speaker and the Sergeant-at-Arms, on the ground that the Speaker could not authorize the Sergeant-at-Arms to bring back to the House a member alleged to be guilty of discourtesy, his power being limited to the preservation of order, and not extending to punishment; *Morning Herald*, November 18, 1911. For further developments, see *Debates*, pp. 1707–48; the Government intend if possible to legislate to give the Assembly the privileges of Parliament, to punish contempts (pp. 1712, 1768, 1769). In Queensland, South Australia, Western Australia, and Tasmania, no general power such as this exists, but it exists in Victoria, the Commonwealth, New Zealand, the Union, Canada, and the Provinces. Another vote of censure on December 12 failed.

Mr. Hazen, the Premier of New Brunswick, and Mr. Cochrane, the Minister of Lands, Forests, and Mines of Ontario. He admitted into his Cabinet the leader of the Conservatives of Quebec, Mr. Monk, as Minister of Public Works, who had co-operated in the election with Mr. Bourassa and Mr. Lavergne. All the provinces were given representation on the Cabinet with the exception of Prince Edward Island; the leadership in the Senate, where of course the Government is in a great minority, was entrusted to Senator Lougheed, of Alberta. Three ministers, including Senator Lougheed, were without portfolios. The ex-Speakers of the Senate and Commons were sworn of the Privy Council,[1] as a compliment in accordance with the precedent set by Sir J. Macdonald's Government. The appointments and contracts placed by the outgoing Government were in the main accepted, but not without exception.[2] As Parliament had been dissolved without obtaining supply (a point argued against the Government during the electoral contest and condemned by Mr. Borden in the House of Commons), it was summoned for November 15 to vote supply, and salaries, &c., were paid in anticipation on a Governor-General's warrant, as not rarely even under the preceding régime.[3] The victory of the Liberal-Conservative party in the Dominion was followed by a dissolution in Ontario which returned Sir J. Whitney to power with a slightly reduced majority and by a change of government in Prince Edward Island consequent on two by-elections, and Mr. Mathieson became Premier of a Conservative government which at the general election of 1912 won nearly every seat.

Page 326, n. 1. The general election of 1911 saw the complete defeat of the Liberal party in Western Australia; the Premier at once resigned, and Mr. Scaddan became Premier of a Labour Government containing two honorary ministers. All but Mr. Scaddan were elected in caucus.

Page 505. Victoria by Act No. 2321 has adopted compulsory preferential voting for the Assembly, and the general election of

[1] *Canadian Gazette*, lviii. 198.

[2] Ibid.; *Commons Debates*, 1911–2, pp. 901–50. The appointments of commissioners under the Boundary Waters Treaty proposed by the late Government were revoked and other names substituted. For a case in Western Australia where an appointment of a Civil Service commissioner was made by the outgoing government before the elections, see *British Australasian*, December 14, p. 8.

[3] e. g. Canada *Sess. Pap.*, 1900, No. 49; and cf. the case of the Order in Council permitting United States vessels to engage in the coasting trade in 1899; ibid., No. 76a. South Australia has proposed a Treasurer's advance to limit excess warrants, see *Assembly Debates*, 1911, pp. 546, 547 (cf. the English Civil Contingencies Fund—£120,000—which is still without legislative sanction despite Todd, *Parliamentary Government in England*, ii. 20, 43, and the Treasury Chest Fund—£700,000—the use of which is restricted to advances for foreign and colonial services; see 40 & 41 Vict. c. 45; 56 & 57 Vict. c. 18). For an illegality in the Commonwealth, see *Parl. Pap.*, 1911, No. 1, pp. 209, 210; Act No. 2 of 1910. Newfoundland provides by s. 33 (*b*) of the *Audit Act*, 1899, for unforeseen expenditure, and now appropriates moneys for the period up to June next but one after the session in which supply is voted. Cf. Western Australia *Debates*, 1911, p. 20; New Zealand Act No. 43 of 1910, s. 43.

November 1911, which followed, returned the Government with undiminished strength. The Commonwealth by Act of 1911 has introduced compulsory registration, and has abolished the postal vote and substituted an absent vote, which New South Wales adopted by Act No. 9 of 1911. The measure was criticized as unfair to women and invalids, and defended on the ground of corruption in the use of the postal vote. See also Humphreys, *Proportional Representation*. Prince Edward Island has not yet adopted the ballot. See also New Zealand Act No. 19 of 1911.

Page 625. In 1911 the Victorian Council suggested an amendment to the Public Works Loan Appropriation Bill, which would have reduced an item for cold storage by £75,000, and altered the application of the sum left (£9,000). The Assembly declined to accept the suggestion, whereupon the Council rejected the Bill on the third reading (*Debates*, 1911, pp. 1967, 1998), and it also so changed a measure regarding wages boards that the Government abandoned it. On the other hand, it unexpectedly passed the Bill for compulsory preferential voting, perhaps because it was expected to be disadvantageous to labour. In the same year the Tasmanian Council contented itself with rejecting a Bill regarding the maintenance of testators' families. The South Australian Council rejected the Veto Bill in 1911 : under this Bill, if a Bill is passed thrice in separate and successive sessions by the Assembly, a general election intervening after the second passing, the Bill may be presented to the Governor for assent ; in the Lower House the second reading was passed by 21 to 15, and the third by 21 to 10. In the debates it was pointed out that the result of giving women the franchise in 1894 had been to increase the strength of the ownership voters and to render the House more Conservative : the proportions of voters are now, Assembly, 182,935 ; Council, 64,390. It was also pointed out that since 1894 repeated efforts had been made to secure a better franchise ; in 1901–3 Mr. Jenkins's Ministry proposed household suffrage and the dual vote ; in 1905 the coalition of Labour and Democratic Liberals proposed £15 occupation qualification and the dual vote, but though this was carried in 1905 and 1906, and a general election fought on the point in 1906, yet even in 1907 only a £17 occupation qualification without the dual vote was conceded by Act No. 920, together with votes for lessees with £50 improvements, ministers, teachers, postmasters, railway stationmasters, and officers in charge of police stations residing on government property, and the increase on the numbers enrolled was only 8,530 in three years. An adult suffrage proposal carried by 22 to 19 in the House was rejected in the Council by 4 to 12 in 1910, and the Land Tax Bill of the Government was rejected on second reading (*Council Debates*, pp. 473 seq.). At the end of 1911 the Council rejected the Appropriation Bill because it included provision for Government brick works for all purposes ; an appeal for Imperial intervention was declined by the Secretary of State on the ground that every constitutional remedy

must first be exhausted ; the Government then proceeded with an ordinary Supply Bill and the Governor granted a dissolution with a view to the putting in operation, if the Government were supported by the people, of the deadlock clause of Act No. 959. The Government had only 21 supporters in the Assembly out of 40.

PAGE 653. A province is not a colony or dependency in the language of a will (*in re Maryon Wilson's estate*, C. A., *Times*, Nov. 9, 1911). The boundaries of Manitoba are now to be largely extended and the subsidy increased (*Manitoba Free Press*, November 28, 1911) —140,000 square miles is said to be the amount. Concessions will no doubt be made to Alberta and Saskatchewan in respect of their lands, on which topic cf. Bramley Moore, *Canada and her Colonies*.

PAGE 653. The result of the Canadian census of 1911, which gives a population of above 7,190,000, is expected to be to reduce the representation of Nova Scotia and New Brunswick by two members each, of Prince Edward Island by one, of Ontario by four, and to increase the representation of Saskatchewan, Alberta, Manitoba, and British Columbia by five members apiece, a net increase of eleven members. Similarly, under the census in Australia, Victoria will lose another member, while Queensland gains one.

PAGE 871. The Seamen's Compensation Bill has been passed in 1911 in an amended form to remedy the unconstitutionality of the first Act.

PAGE 873. See *Parl. Pap.*, 1911, No. 2. Only 53·31 obtained ballot papers as against 62·80 at the general election in 1910.

PAGE 1021. The new edition of the *Colonial Regulations* (1911) forbids the acceptance of presents by Governors even on leaving office.

PAGE 1029, n. 2. In *The King* v. *Lovitt* the Privy Council (November 3, 1911) reversed the judgement of the Supreme Court, asserting that the provincial Act had succeeded in taxing as situate within the province a deposit by a person who died domiciled in Nova Scotia in the New Brunswick branch of a bank, though the deposit could have been paid in London.

PAGE 1047. For a different view, cf. McGrath, *Newfoundland in 1911*, pp. 52–60.

PAGE 1077, n. 2. The decision of the Privy Council in *Musgrove* v. *Chun Teeong Toy* is adversely criticized by Harrison Moore, *Act of State*, pp. 95–9. But the point of the decision, which deliberately declined to discuss the question of act of state, is that an alien excluded has no right of action, not that the Crown has the right to exclude, and presumably it is a relic of the old rule than an alien could not bring an action at all (Co. Lit., 128 a, 129 a), which has in most matters died out. The power is not rarely acted on in South Africa, e. g. *Raner's* case, 14 C. T. R. 24 ; and several cases in 1911. Nor does the case of *Cook* v. *Sprigg* ([1899] A. C. 572) in any way

contravene the usual rule that a Governor cannot do an act of state without ratification, for the act of state arose from the treaty of cession of Pondoland, and the Government of the Cape had special authority from the Crown to deal with Pondoland, by Letters Patent of June 7 and July 27, 1894 (see Act No. 5 of 1894 of the Cape), and the English Courts systematically decline to consider rights arising from annexation. In *Sprigg* v. *Sigcau* ([1897] A. C. 238) the plea of act of state was not substantially urged, just as it was not urged in *R.* v. *Crewe, ex parte Sekgome* ([1910] 2 K. B. 576), but in the latter case the exercise of legislative authority under the *Foreign Jurisdiction Act*, 1890, and the Order in Council for the Bechuanaland Protectorate made thereunder, was held sufficient to justify a deportation and detention, in the former the terms of Act No. 5 of 1894 were not wide enough to do so. For future cases suitable provision was made by Act No. 29 of 1897. Cf. Keith, *State Succession*, pp. 13 seq., 83.

Page 1099. The attitude of the Commonwealth Government is shown by its action in 1911 in repealing the rule laid down in South Australia in 1910 forbidding Asiatics to obtain licences for fishing in the Northern Territory; see *Parliamentary Debates*, 1911, pp. 751, 752. Queensland has adhered to the plan of the language test both as regards land (1 Geo. V. No. 15, ss. 59, 62, 94) and sugar works (2 Geo. V. c. 8, s. 9), and in a Leases to Aliens Bill of 1911. Victoria has passed in 1911 the Bill regarding accommodation for shearers, which makes requisite separate provision for quarters for Asiatics. A Widows Pensions Act of New Zealand in 1911 and a Factories Amendment Act of Tasmania contain clauses affecting Asiatics.

Page 1105. A good example of the combination of Imperial and Colonial legislation to carry out treaty or quasi-treaty obligations is seen in the issue of Orders in Council under s. 238 of the *Merchant Shipping Act*, 1894 (e. g. for Japan in 1911, applying to all the British Dominions), as regards foreign deserters from merchantmen, and the existence in many Colonies of Acts dealing in detail with such cases and largely supplementing the Imperial Act (e. g. New South Wales, Act No. 47 of 1898; Western Australia, No. 19 of 1878; Queensland Act, 16 Vict. No. 25; Tasmanian *Foreign Seamen Act*, 1859 (No. 8); Natal Act No. 50 of 1903; Canada *Rev. Stat.*, 1906, c. 113, s. 323; New Zealand, Act No. 178 of 1908, part xiv).

Page 1109. New Zealand by Act No. 95 of 1903 took power to restrict the coasting trade to cases where reciprocity was allowed, and Canada by Act 7 & 8 Edw. VII. c. 64 has full power to close the coasting trade in any case it pleases, but has relaxed the rule by Order in Council of December 9, 1909. Australia proposes to take similar powers in the Navigation Bill of 1911; cf. *Debates*, 1911, pp. 537, 538.

Page 1121. The Imperial Government permitted the Cape to enter into a Customs Union with the Orange Free State (see Acts

No. 1 of 1889, 3 of 1895), and to treat the Free State differentially as opposed to the United Kingdom and British possessions. The Free State had once indeed been British territory, but was then an independent state, and the action of the Cape raised difficult questions of international law as regards most favoured nation clauses in treaties.[1] The South African Customs Unions of 1903 and 1906 contemplated the possibility of the accession of foreign territories (e. g. Mozambique; see Natal Act No. 9 of 1906, s. 3), and the Transvaal Colony made an agreement with Mozambique under which the products and manufactures (except spirits) of that territory enter the Colony (now the Province) free of duty. The Protectorates now enjoy a customs régime based on the Union as modified by s. 12 of the schedule to the *South Africa Act*, 1909, while the Rhodesias are dealt with on the basis of the Union.[2] The United Kingdom is not given the same terms, but the United Kingdom conceded the principle in 1873 in the case of Australia.

Page 1153. The treaty with Spain can be denounced at six months' notice under the notes of December 28 and 29, 1894. Sweden and Mexico have agreed to permit the separate withdrawal of the Dominions. For separate adherence, cf. *Maritime Conventions Act*, 1911; *House of Commons Debates*, xxxii. 2687–90.

Page 1184. Cf. Bowen, *Thirty Years of Colonial Government*, i. 250 seq.

Page 1215. In the session of 1911 New Zealand amended the Act of 1909 in accordance with the undertaking given to the Imperial Government, by restricting the control of bills of lading to cases of carriage from New Zealand. The amendment raised no protest in Parliament. See Act No. 37.

Page 1237. The Copyright Act is now law as 1 & 2 Geo. V. c. 46.

Page 1265. The Union Defence Bill, which will no doubt become law in 1912, contemplates compulsory training only if voluntary enlistment is insufficient to maintain the first line of defence at a level of about 25,000 men. The members of that force will consist of five regiments of mounted rifles, absorbing the Cape Mounted Police, and available for police as well as military service, with artillery; the Coast Garrison force, and the Active Citizen force, viz. those between 17 and 25 who are being trained. The Second Line will include citizens to age 45 who have been trained or have served in Rifle Associations. In case of a levy *en masse* all Europeans up to 60 may be called on to serve. Those who are trained will serve for four years with a camp attendance of from 8 to 15 days and a certain number of drills; others will pay £1 a head a year up to age 44. Non-Europeans are relieved of the burden of defence entirely. In this connexion it is important to note that in an appeal under the

[1] See Dilke, *Problems of Greater Britain*, i. 477 seq.
[2] *Colonial Office List*, 1911, p. 283.

Cape *School Boards Act*, 1905, the Appellate Division of the Supreme Court has decided that any person one of whose nearer ancestors was black or yellow is a non-European; *Times*, Dec. 14, 1911.

Page 1306. The title Honourable is now recognized throughout the Empire in the case of judges of the Supreme Courts of all the Australian States, of the Union of South Africa, of New Zealand, and of Newfoundland and of the High Court of the Commonwealth during their tenure of office, and on retirement if specially recommended. In the case of the Provinces of Canada the judges of the Supreme Courts are given the style of Honourable locally, and so in the case of the Supreme Court, but in respect of these the official style of Lordship is used; see e.g. the notice prefixed to 43 S. C. R. These cases are not covered by the new rule so far. See *Gazette*, Jan. 1, 1912. The Administrators of the Union Provinces are so styled.

Pages 1309, 1310. The Law Officers of the Crown definitely advised on April 30, 1859, that precedence by birth or title in the United Kingdom did not automatically convey similar precedence in a Colony, and that it was proper for a Colonial Governor to regulate precedence (in default of special instructions) according to local conditions; see South Australian *Parl. Pap.*, 1871, No. 115. By dispatch of January 26, 1869, to the Governor of Victoria a pledge was given that no precedence would be accorded officially in future to any ecclesiastical person, the letters patent creating bishoprics having been held to be invalid; see Victoria *Parl. Pap.*, 1890, No. 38, p. 6. That archbishops rank by date of appointment and not of consecration as bishops when precedence is granted (as in Canada and Newfoundland) is laid down by a dispatch of 1910; see Canada *Statutes*, 1911, p. vi. The vexed question of relative rank of Imperial and Colonial officers (Victoria *Parl. Pap.*, pp. 7–10) has been settled by the rule that Imperial officers in the Colonies receive Colonial commissions and rank under them.

Page 1323. Other Acts which would not apply to a naturalized British subject outside his own place of naturalization are the *Foreign Marriages Act*, 1892, and the *Wills Act*, 1861. So he would be exempt from the extraterritorial operation of the law of treason (35 Hen. VIII. c. 2), murder (24 & 25 Vict. c. 100, s. 9), bigamy (ibid., s. 57); certain offences under the *Merchant Shipping Act*, 1894, and the *Explosive Substances Act*, 1883, and the *Foreign Enlistment Act*, 1870; nor would he fall within the protection of clauses in extradition treaties relating to the non-surrender of nationals: *Parl. Pap.*, Cd. 3524, p. 142. See also Piggott, *Nationality*. The Australian Act of 1903 contains (s. 5) a curious clause which contemplates that an aboriginal native of New Zealand may yet not be a British subject, which is an impossibility; and s. 9 must be read as applicable only to a woman marrying a naturalized British subject, or it is repugnant to s. 10 of the Imperial Act.

PAGE 1347. New Zealand alone adopts the rule of compulsory retirement of judges appointed after the passing of an Act of 1903 on attaining the age of 72 years. In the Crown Colonies, judges who, save in British Honduras, Malta, Gibraltar, and Leewards, hold at pleasure are subject to the usual retiring age rules, but this would run counter to the Constitutions of Canada, the Commonwealth, and the Union, which rest on Imperial Acts : in the two latter cases the Constitution can be modified by local action.

PAGE 1354, n. 1. In *R.* v. *Dodd*, (1874) 2 N. Z. A. C. R. 598, it was held by the Court unanimously that the Supreme Court of New Zealand could not punish manslaughter committed by a British subject on a foreign ship (American) on the high seas (500 miles from Tasmania), though such a power was possessed by English Courts provided the accused did not belong to the ship, the counsel for the accused (Stout, now C.J.) and both Johnston J. and Richmond J. holding that the Act 30 & 31 Vict. c. 124, s. 11, did not apply to a Colonial Court. The decision may have been correct, for the accused may not have been a British subject—he claimed to have been naturalized in the United States—and if he were, may have been a member of the crew (cf. Richmond J., at p. 602), but the wording of the section ('any Court of Justice in Her Majesty's Dominions') is absolutely conclusive in favour of the jurisdiction, and it may be presumed that none of the judges read the Act.

PAGE 1423. The power of the Roman Catholic Church in Canada has been much discussed in connexion with the *Hebert* case, where a marriage of Catholics celebrated by a Protestant clergyman was declared invalid by Archbishop Bruchesi, and then by Laurendeau J. held invalid on the principle laid down afresh in the *ne temere* decree requiring marriages to be celebrated by a Roman Catholic priest ; the decree, however, extends the principle to mixed marriages. The Quebec Court held that (1) Catholics cannot be married by a Protestant, and (2) questions of the validity of Catholic marriages must be settled by the ecclesiastical courts. On both points the Courts have differed ; Catholic marriages by Protestants have been upheld in *Burn* v. *Fontaine*, 4 R. L. 163 ; *Delpit* v. *Coté*, R. J. Q. 20 C. S. 338 ; and denied in other cases in accordance with the views of the ecclesiastical courts. Similarly some judges have asserted their authority to decide the issues (*Delpit* v. *Coté*, R. J. Q. 20 C. S. 338, per Archibald J.), and reversed the decision of an archbishop, while others have held the reverse (*Durocher* v. *Degre*, R. J. Q. 20 C. S. 456, following *Laramée* v. *Evans*, 24 L. C. J. 235). The *Hebert* case is under appeal, and the issue will, it is hoped, be taken to the Privy Council. The Quebec Courts have not yet refused to deal with cases of mixed marriages (cf. *Dorion* v. *Laurent*, 17 L. C. J. 324 ; *Burn* v. *Fontaine*, 4 R. L. 163), nor have they decided any case on the new branch of the *ne temere* decree ; see Ewart, *The Kingdom Papers* pp. 121–32. Mr. Lancaster has, however, introduced a Bill into the Dominion Parliament to declare valid any marriage duly celebrated

by a minister of religion (*Canadian Gazette*, lviii. 401). This seems clearly *ultra vires*; cf. *Debates*, pp. 590–2, 737–40, 819–21.

Page 1426, n. 1. Canada is organized into three ecclesiastical provinces: that of Canada (an archbishop and nine other bishops), of Rupert's Land (an archbishop and seven bishops), and of British Columbia (three independent dioceses), with a Primate of All Canada (at present the Archbishop of Rupert's Land). New Zealand has only six dioceses, the Bishop of Dunedin being Primate.

Page 1436. The South Africa cases were followed in *Bishop of Columbia* v. *Cridge*, 1 B. C. (Irving) 5.

Page 1457, n. 1. In *Ryland* v. *The Queen* [1] a fiat was granted to a petition of right in respect of a claim made by an officer of the Province of Canada: the case was decided on the merits, and the judges did not decide the objection taken by the Crown that as the claim was in respect of service under a Colonial Government there could be no claim on the Crown in England. In *West Rand Central Gold Mining Co.* v. *The King* [2] a fiat was granted in respect of a claim against the Crown in respect of the seizure of gold by the Transvaal Government prior to the outbreak of hostilities in South Africa in 1899. The claim was by consent treated as if founded in contract, and the Imperial Government was said to be liable as the successor of the Republican Government, a view rejected by the Court.[3]

It may be added, with regard to the question discussed above (pp. 142–4) as to the petition of right in Colonies which do not enjoy English law, that in the case of Trinidad the Supreme Court held that an action lay against the Crown direct, and though this decision was appealed against, the Privy Council decided the case on other grounds.[4] In discussing the case of Ceylon [5] the Judicial Committee assumed that the petition of right was not available, but the point was not argued. In the Natal case [6] the Judicial Committee did not decide whether a fiat by the Crown would have authorized the Natal Court to decide a claim against an Imperial officer on a government contract, but that it would has been held in Mauritius.[7] In Quebec the Act of 1883 [8] expressly preserves any mode of proceeding available before it was passed, apparently presuming that some form of claim against the Crown existed without the passing of an Act, a

[1] *Times*, December 18, 1883, p. 2. The facts will be found in full in *Provincial Legislation*, 1867–95, pp. 269–78.

[2] [1905] 2 K. B. 391.

[3] See Keith, *State Succession*, pp. 68 seq.

[4] *New Trinidad Lake Asphalt Co.* v. *Attorney-General*, [1904] A. C. 415, at pp. 419, 420.

[5] *Hettihewage Siman Appu* v. *Queen's Advocate*, 9 App. Cas. 571, at p. 587.

[6] *Palmer* v. *Hutchinson*, 6 App. Cas. 619, at p. 623.

[7] *Murray* v. *Johnstone*, 1866 *Mauritius Decisions*, 21. This is also the view of the Cape Supreme Court; see *Fraser* v. *Sivewright*, 3 S. C. 55; Van Zyl, *Judicial Practice in South Africa*, pp. 5, 6. In Mauritius claims against the Crown in its colonial capacity are regularly brought direct, see *Colonial Government* v. *Laborde*, 1902 *Mauritius Decisions*, 19; Ordinance No. 35 of 1899. So in the Cape up to 1881 at least without any Act.

[8] 46 Vict. c. 27, s. 17. See Code of Civil Procedure, ss. 1011–25.

view urged in *Harvey* v. *Lord Aylmer*.[1] The *Petition of Right Act*[2] of Canada makes no distinction between claims arising in Quebec against the Federal Government and other claims, and expressly contemplates the bringing of such claims in Quebec,[3] while at the same time it limits the cases in which petitions can be brought to cases such as could be brought in England in 1860,[4] and it expressly preserves existing remedies.[5] The evidence against a petition of right lying in Quebec is thus reduced to the very unjudicial dictum of one judge in a case[6] decided on other grounds, in which another judge asserted its existence. The question is never likely to come for decision, as St. Lucia has adopted a Crown Suits Ordinance in 1911[7] which gives a similar remedy to the English petition of right, and British Guiana adopted a similar ordinance in 1904.

Page 1460. As the distinction drawn above between the case of a Governor and the King has been questioned it may be as well to state the position as regards the King according to recent precedents. It has been sufficiently shown above that the powers of refusing a dissolution and of compelling the resignation of ministers still exist in the case of a Governor, even if many considerations require that they should be used with caution. It is admitted that both in the case of the Governor and in the case of the King a dissolution of Parliament without the advice of ministers is an impossibility. In the early years of Queen Victoria's reign it is clear that she took the view that she had a discretion as to granting a dissolution and that the grant was in the nature of an appeal to the country on behalf of ministers, and one which ought not to be used except in extreme cases and with a certainty of success.[8] But in 1858, when Lord Derby asked her permission to say that, if a vote of censure were carried against him in the Commons, Parliament would be dissolved, Queen Victoria consulted Lord Aberdeen, and Lord

[1] Stuart, 542, at p. 551.

[2] See 38 Vict. c. 12; 39 Vict. c. 27; *Rev. Stat.*, 1886, c. 136; 1906, c. 142. Cf. for a claim in respect of Quebec, *R.* v. *Belleau*, 7 App. Cas. 473.

[3] 38 Vict. c. 12, s. 17. The Exchequer Court became the only court normally used for this purpose by 39 Vict. c. 27.

[4] 38 Vict. c. 12, s. 8; 39 Vict. c. 27, s. 19; *Rev. Stat.*, 1886, c. 136, s. 21 (3); in 1906, c. 142, this disappears, because the law was extended by 50 & 51 Vict. c. 16, s. 16 (c) to cover cases of claim in tort.

[5] 38 Vict. c. 12, s. 21 (3); 39 Vict. c. 27, s. 19; *Rev. Stat.*, 1886, c. 136, s. 21 (2).

[6] *Laporte* v. *The Principal Officers of Artillery*, 7 L. C. R. 486. See Clode, *Petition of Right*, pp. 37–9. The case is of no real value. Cf. in Upper Canada, *Tully* v. *The Principal Officers of Her Majesty's Ordnance*, 5 U. C. Q. B. 6, where the case likewise failed, although a petition of right certainly could have been brought there.

[7] No. 1 of 1911. Compare, however, s. 2025 of the Civil Code, which recognizes the petition of right to the King recognized in the Quebec Civil Code, s. 2211. In Fiji claims against the Crown are brought in the Supreme Court by action against the Attorney-General without a fiat; see *Marks* v. *Attorney-General*, 1875–97 F. L. R. 219, at p. 226.

[8] *Letters of Queen Victoria*, ii. 91.

Aberdeen laid it down in the clearest terms that if the minister advised the Queen to dissolve she would, as a matter of course, do so, although he did not suggest that the Queen should promise a dissolution in advance of the defeat of the Government. In the actual case in question the Queen permitted Lord Derby to know that he would have a dissolution if he were defeated, but as a matter of fact he was sustained on the vote of censure.[1]

Further, it may be pointed out that the advance of ministerial responsibility in the nineteenth century has been well marked. It is true that William IV did not, as was believed before the publication of Lord Melbourne's papers, dismiss the Melbourne Ministry in 1834, but he was anxious for its retirement and eagerly accepted the opportunity afforded by the offer of resignation made by Lord Melbourne in a letter of November 12, as a result of Lord Althorp's removal from the Commons.[2] But in 1858 Lord Aberdeen spoke of a dismissal as out of the question and unprecedented. Moreover, in 1832 Lord Grey resigned when it appeared that the Reform Bill would be transformed in committee in the Lords, and the King tried to form a new Government, commissioning Lord Lyndhurst and the Duke of Wellington for this purpose. They failed in view of Peel's refusal to consent to any reform measure, and then only was the authority given to the Prime Minister to create peers if necessary.[3] In 1910–1 the King never attempted to form an alternative government, so important was it considered to keep the Crown out of political controversy.[4]

Page 1517. The House of Lords declined on December 12 to accept the Naval Prize Bill, which would have enabled the Government to ratify the Declaration of London. In the Commons strong protests were made against the practice of not laying conventions before Parliament for authority to ratify, and it is clear that the growing tendency is to insist on giving Parliament a formal voice in ratification, not merely to ask it to legislate with a view to ratification. The example of foreign countries (e. g. France and Germany) is evidently having effect; see *Lords Debates*, x. 809–95; *Commons*, xxxii. 1597 seq.

Page 1529. The Bill to increase the House of Lords as a Court by adding two judges was somewhat severely criticized in the Commons on the ground that the addition of further judges was needlessly expensive and was not asked for by the Dominion Governments, and it was left over at the end of the 1911 session; see *Debates*, xxxii. 2449–78, 2554.

[1] *Letters of Queen Victoria*, iii. 289–91; in great measure owing to the fact of his being able to dissolve being known.

[2] See *Melbourne Papers*, pp. 220–6; Maxwell, *A Century of Empire*, ii. 37–9 the older view is seen in the *Peel Letters*, ii. 288; Todd, *Parliamentary Government in England*, i. 133–6; and even in Dicey, *Law of the Constitution*,[7] pp. 429–32.

[3] Anson, *Law of the Constitution*, i.[4] 355, 356; Maxwell, i. 335 seq.

[4] See Mr. Asquith in *House of Commons Debates*, xxix. 811 seq.; Lord Crewe in *House of Lords Debates*, ix. 836 seq.

PAGE 1537. The proposals of the Postmaster-General were carried into effect, reduced rates for press telegrams of a not urgent character of 2½*d.* to America and 5*d.* to Australia being introduced from December 15 as a result of negotiation with the Western Union Cable Co., which took over the cables of the Anglo-American and Direct United States Companies; further it was arranged to introduce from January 1, 1912, half rates for telegrams in plain language between the United Kingdom and the Dominions and Colonies subject to their being liable to be deferred for not over twenty-four hours.

PAGE 1552. The Canadian Government has decided to reconsider the whole position in 1912 in conjunction with the Admiralty, but will not proceed with the programme accepted by the late Government.[1] Suggestions have been made in the press for the substitution of a direct contribution to the navy in place of the provision of an auxiliary fleet.[2] The question in any case will be settled by the people of Canada after a scheme has been prepared.

The creation of the naval forces of the Dominions and their claim for consultation in foreign politics raise again the question of pecuniary responsibility, e. g. for illegal capture by Dominion fleets, or for failure to observe neutrality rules. Formerly the Imperial Government bore the pecuniary responsibility (e. g. in respect of the failure of the Government of Victoria to prevent the violation of neutrality by the *Shenandoah* in 1865[3]), but the rule will require full consideration in the light of the changed circumstances of independent Dominion navies. Colonial Governments already bear the expense of violations of international law within their territories, e. g. in the case of the Vancouver riots of 1907, Canada paid the cost of making good the damage done; in 1878 Newfoundland paid the damages in the Fortune Bay incident,[4] and any damages awarded under the Pecuniary Claims treaty with the United States will, of course, be paid by Canada or Newfoundland as the case may be.

PAGE 1552. The Act passed to carry the arrangement into effect was the *Naval Discipline* (*Dominion Naval Forces*) *Act*, 1911. It

[1] See Mr. Borden in *House of Commons Debates*, 1911, pp. 62–5; Mr. Hazen, ibid., pp. 178–80; Mr. Monk, ibid., pp. 240–8; *contra*, Sir Wilfrid Laurier, ibid., pp. 50 seq. Cf. *Canadian Gazette*, lviii. 415, 416, which emphasizes the effect on Canadian feeling of the revelations of the dangerous situation which existed in July and August 1911 in connexion with German policy towards the Moroccan question (see Imperial *House of Commons Debates*, November 27, December 12).

[2] See *Montreal Daily Star*, October 20, November 3, December 20, 1911. The project had often been raised before the election by the *Star* and other papers; see *Canadian Annual Review*, 1911, pp. 176 seq. Another suggestion is a coast defence scheme only; *Manitoba Free Press*, January 23, 1912; cf. Leacock, Canada *University Magazine*, x. 535–53.

[3] See Morris, *Memoir of George Higinbotham*, pp. 83–93. But Jamaica, a Crown Colony, was compelled to pay half the cost of the mistake of her Governor in detaining the *Florence*; see *Parl. Pap.*, C. 3453, 3523.

[4] See *Parl. Pap.*, C. 2184, 2717, 2757, 3059, 3762.

applies to the naval forces raised and provided by a Dominion before or after the Act to which the provisions of the *Naval Discipline Act*, 1866, and amending Acts have been made applicable, the Act of 1866 as amended subject to any adaptations which may have been or may be made by the Dominion to adapt the Act to the circumstances of the Dominion, including the substitution of Governor-General for Admiralty, and empowers the Crown by Order in Council to modify the Act so as to regulate the relations of the Imperial forces to those of the Dominions, but if the ships of a Dominion are placed at the disposal of the Admiralty the Act of 1866 shall apply without such modifications and adaptations. The Act does not operate in any case unless provision is made for its coming into effect by the Dominion, and presumably the Dominion Parliament can terminate its effect as regards that Dominion. The Commonwealth in 1911 has amended its *Naval Defence Act* of 1910 and has reduced the length of senior cadet training.

The Union of South Africa do not propose in their Defence Bill to start a naval force, but only to continue the Royal Naval Reserve branch, while they will develop the artillery forces which now serve to supplement the Imperial garrison artillery.[1]

PAGE 1588. The power of the Governor to grant lands in the absence of an Act is also discussed in *Cunard* v. *The King*, 43 S. C. R. 88, especially at pp. 95–8 by Duff J.

[1] The Naval Reserve will be formed under the authority of the Imperial Acts of 1865 and 1909 (see ss. 21, 22). The Bill provides also for compulsory cadet training from 13–17 in populous areas (s. 6), and for a military college on a modest scale (s. 47). The Memorandum accompanying the Bill recognizes (p. 4) that defence of the coast and shipping depend on the British Navy, but (p. 1) asserts the duty of South Africa to assume a responsibility for her own defence. Co-operation with Imperial military forces is provided for in ss. 13, 15, 97. The Act will ultimately repeal Cape Acts No. 32 of 1892, 4 of 1893, 16 of 1895, Natal No. 36 of 1905, 30 of 1905, 36 of 1906; Transvaal Ordinances No. 37 of 1904; Act No. 21 of 1908, and it repeals forthwith Cape Acts No. 7 of 1878, 4 of 1884; Natal No. 22 of 1907; Orange River Colony Ordinance No. 25 of 1905; and the Cape and Natal *Naval Volunteers Acts* of 1908 and 1907.

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